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In The

Supreme Court of the United States

October Term, 1982

PEOPLE FOR FREE SPEECH AT SAC,
ANNE ELSE,

Petitioners,

vs.

UNITED STATES AIR FORCE,
COL. JOHN R. McKONE,
MAJ. GARY TROUT,
In their official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the United States Air Force has opened certain portions of an otherwise closed Air Force base to the general public to "show the community the relationship between national objectives and the missions of various Offutt organizations" and invited several non-military speakers to communicate messages not directly related to the purpose of the open house, may the Air Force exclude petitioners' message based on its content or viewpoint?

2. Has the Air Force created a temporary public forum in the opened portions of the base so that only a compelling governmental interest, not present here, could justify exclusion of petitioners' message?

3. Has the Air Force violated petitioners' right to procedural due process by its selective enforcement of AFR 190-5?

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vs.

UNITED STATES AIR FORCE,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, People for Free Speech at SAC* and Anne Else respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States

*People for Free Speech at SAC was incorrectly referred to during the expedited appeals as Persons for Free Speech at SAC. This accounts for the different name on the opinion of the Court of Appeal.

Court of Appeals for the Eighth Circuit entered in this proceeding on April 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 675 F. 2d 1010 and appears in the Appendix A hereto. The opinion of the United States District Court is unreported and appears in the Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1982. A timely motion for extension of time within which to file a petition for certiorari was sustained, giving petitioners until August 27, 1982 to file the petition. This Court's jurisdiction is invoked under Title 28, U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Where the United States Air Force has opened certain portions of an otherwise closed Air Force base to the general public to "show the community the relationship between national objectives and the missions of various Offutt organizations" and invited several non-

military speakers to communicate messages not directly related to the purpose of the open house, may the Air Force exclude petitioners' message based on its content or viewpoint?

2. Has the Air Force created a temporary public forum in the opened portions of the base so that only a compelling governmental interest, not present here, could justify exclusion of petitioners' message?

3. Has the Air Force violated petitioners' right to procedural due process by its selective enforcement of AFR 190-5?

STATUTORY PROVISIONS INVOLVED

AFR 190-5(3)(d) and (e) which appear as Appendix C hereto.

STATEMENT OF THE CASE

Jurisdiction in the district court was based on Title 28, U. S. C. § 1331 due to the presence of a federal question. Relief was sought in the nature of a declaratory judgment under Title 28, U. S. C. § 2201 and for injunctive relief under Title 28, U. S. C. § 1361.

Petitioners sought permission to participate in the June 14, 1981 Offutt Air Force Base open house by letter (Exhibit 22) addressed to the base commander. Colonel

McKone, also by letter (Exhibit 23) denied the request, stating that petitioners' "proposed activities would not be in keeping with the purpose of the Open House program." A hearing on June 12, 1981 was held by the United States District Court for the District of Nebraska, Judge Schatz holding for respondents. On June 13, 1981, an expedited appeal was heard before Chief Judge Donald Lay of the Court of Appeals. After a telephonically convened three-judge panel, the Court of Appeals refused to grant injunctive relief. Justice Blackmun declined to enter an injunction on June 14, 1981. The case was remanded to the district court for further proceedings. Petitioners filed an amended complaint, respondents answered, and a further trial was had on August 3, 1981. On September 1, 1981, the district court granted judgment to respondents and filed a memorandum opinion. Petitioners appealed. On November 9, 1981, the Eighth Circuit heard the appeal en banc. The Court of Appeals, per Judge Ross, affirmed the judgment of the district court on April 28, 1982.

The petitioners sought to participate at the Offutt Air Force Base open house held on June 14, 1981. Petitioners also seek to participate in open house programs in the future. Petitioners agreed to comply with any reasonable time, place, or manner requirements. Petitioners offered to let the Air Force screen their literature. The Air Force refused. Petitioners sought a booth. They were denied one. Petitioners sought to wear messages on their clothing. With one exception, such clothing was excluded from the base during the open house.

The open house is an annual program where Offutt, an otherwise closed base, opens certain areas of the base to the general public. 1981 was the sixth such open house. 129,000 civilians attended. As many as 250,000 visitors could be accommodated at the open house. The Air Force diverted personnel, facilities, and equipment from the regular mission to put on this public relations event. There were aircraft displays, drill teams, static displays, the SAC band, booths for recruiters of all branches of the military, and booths for non-military invitees. The non-military invitees were permitted to distribute literature only after it was censored by Major Trout (Vol. I, 35:18-21). The non-military invitees included defense contractors, a model airplane club, Operation Bridge (a local drug awareness group), a black awareness group, the Bellevue Chamber of Commerce, and Big Brothers-Big Sisters. Petitioners sought to be treated in the same manner as the other non-military invitees.

On the day of the open house, members of People for Free Speech at SAC assembled lawfully at the gates into Offutt. Several held a banner, while others held placards. John Hutchens tried to enter the base wearing a "U.S.C." T-shirt with a small sign taped to the back. The sign explained that John would be praying and why he would be praying (Vol. II, 54:8-12). He was denied entry until the sign was removed (Vol. II, 54:15-24). John was stopped when he tried to leave the base (Vol. II, 56:1-5). He was told that he could not reenter the opened base because he was associated with the people engaged in a lawful off-base demonstration (Vol. II, 56:16 to 57:6). Several other members of petitioner were likewise prevented from entering because of their clothing messages

or button messages. The chief of base security instructed the guards at the gates not to admit civilians if they had signs, buttons, or clothing that was "political" or "ideological" in nature. The guards were not given a definition of these terms, only told to make judgment calls (Vol. II, 14:20 to 15:7, Vol. II, 16:13-18).

During the open house, eight members of petitioner attended a regularly scheduled Catholic mass at the base chapel. These eight people were not disruptive in any way. After the mass, they were "detained," fingerprinted, photographed, issued ban and bar letters, and expelled from the base. At the time the eight entered the chapel, it was within the opened area of the base and not marked closed to the public. These eight people were identifiably associated with the petitioner. There does not appear to be any other reason why they were kicked off the base.

The Air Force communicated a message to the civilian audience created by the open house. The non-military invitees communicated a message to the same audience. Petitioners' message was excluded because the base commander decided that petitioners' "proposed activities would not be in keeping with the purpose of the Open House program." (Exhibit 23).

REASONS FOR GRANTING THE WRIT

1. The United States Air Force has been permitted to disregard the First Amendment precept of governmental content neutrality in the marketplace of ideas.

The open house was designed by the Air Force to convey a positive image to the community. The Court

of Appeals acknowledged that the Air Force was speaking at the open house. This pro-nuclear weaponry, pro-Air Force pitch was directed at the 129,000 civilians who came to the open house. Several other speakers were permitted to convey messages during the open house, although none was required to address the same topic which the Air Force espoused. The Air Force excluded petitioners' response to several of these messages.

The Air Force made no effort to distinguish the political or ideological character of its speech from the political or ideological character of petitioners' reply. The Court of Appeals simply held that the Air Force can create a platform from which it may seek public approbation and, while inviting an assortment of speakers to address the same audience, can exclude petitioners based on the content of their speech.

The Air Force amply demonstrated that hostility to petitioners' viewpoint was the motivation for petitioners' exclusion. Petitioners offered to submit their literature to the base commander for review prior to the open house. (Petitioners' Complaint, § 22, admitted by defendants' Answer, § 10.) The base commander refused to even review the material. There is no suggestion that the literature posed any danger to the mission, loyalty or discipline at Offutt Air Force Base. The Air Force maintained a sign, button, and clothing barrier at the entrances to the base. The sentries were instructed that no "political" or "ideological" messages were to be allowed in. At least one member of petitioner was told that he could not reenter the base because he was associated with a lawful off-base demonstration. And eight members of petitioner were

expelled for celebrating a regularly scheduled Catholic mass at the base chapel.

The Air Force made plain its willingness to admit speakers whose views it liked. As the dissent noted:

> The defense contractors have a vital interest in promoting public support for defense policies which emphasize high technology products and weapons systems. Moreover, public confidence in the weapon products is crucial to sustaining the policies which lead to such products. In promoting their current products to the general public at the open house, the contractors are unmistakably promoting public support, for the defense policies on which those products depend. *Persons for Free Speech at Sac*, at 1024.

The Air Force invited 129,000 civilians to listen to its public relations pitch. It invited defense contractors and others to speak. The Air Force excluded petitioners' reply based on the petitioners' disfavored viewpoint concerning the topic being discussed. This content discrimination plainly violates the First Amendment.

This Court has repeatedly held that government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of Chicago v. Mosley*, 408 U. S. 92, 96 (1972); *United States Postal Service v. Greenburgh Civic Association*, 453 U. S. 114 (1981).

The Air Force has been permitted to dominate the marketplace of ideas which it created by opening the base to the public. This manifestly distorts the search for truth and prevents the citizenry from making informed choices about the topics discussed at the open house.

The content based discrimination practiced by the Air Force was not authorized by AFR 190-5. AFR 190-5 is both overbroad and routinely ignored by the Air Force. The regulation excludes groups (such as the Bellevue Chamber of Commerce and Operation Bridge), commercial ventures (such as Boeing, McDonnell-Douglas, and General Electric) and practically everyone else. The regulation does not exclude only ideological, religious or political groups. The regulation is overbroad because it is not limited to activities which affect loyalty, discipline, or good order. It is not limited to activities which may affect the mission. The Army regulation upheld in *Greer v. Spock*, 424 U.S. 828 (1976) did not permit a base commander to disapprove of speech activities unless he found "a clear danger to [military] loyalty, discipline, or morale." Twice since *Spock*, this Court has looked to the impact of the proposed speech on the mission and military discipline before upholding military regulations. *Brown v. Glines*, 444 U.S. 348 (1980); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980).

The Court of Appeals did not reach the validity of AFR 190-5. Nevertheless, it did rely on the regulation to support its argument that the base commander's content discrimination was constitutional.

The Air Force has been permitted to disregard the precept of content neutrality in government control over the marketplace of ideas. The distinction drawn by the Air Force is not related to the mission of the base, nor to any need to maintain the loyalty, good order, or discipline of the military personnel. Indeed, the only ap-

parent basis for petitioners' exclusion is the base commander's hostility to petitioners' viewpoint.

2. The Court of Appeals' public forum test differs in principle from that applied by other circuits.

The Court of Appeals determined that Offutt Air Force Base was not a public forum during the open house in the portions of the base open to the public. The majority reached this conclusion by reviewing "the historical and traditional uses of the relevant government property," *Persons for Free Speech at SAC*, at 1015, then deciding that the open house was not such "a deviation" from those uses as to create a public forum. The dissent reached a contrary result by applying the incompatibility test taken from *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the [proposed] manner of expression is basically incompatible with the normal activity of a particular place at a particular time.")

Several other courts of appeal have adopted the incompatibility test. *Grace v. Burger*, 665 F. 2d 1193, 1202 (D.C. Cir. 1981) prob. jur. noted 50 U.S.L.W. 3998.01 (1982) (Supreme Court grounds); *Dallas Association, etc. v. Dallas Cty. Hospital Dist.*, 656 F. 2d 1175 modified 670 F. 2d 629, 631 (5th Cir. 1982) (county hospital lobbies and waiting areas); *Bonner-Lyons v. School Committee of the City of Boston*, 480 F. 2d 442 (1st Cir. 1973) (material sent home with pupils addressed to the parents); *Wolin v. Port Authority of New York*, 392 F. 2d 83, 89 (2nd Cir. 1968) (bus terminal); *National Socialist White*

People's Party v. Ringers, 473 F. 2d 1010 (4th Cir. 1973) (school auditorium).

The dissent accepted the incompatibility test. Under that test, petitioners have shown that the open house was a temporary public forum. Simply because the public is freely admitted to a government facility does not mean the facility becomes a public forum. *Greer v. Spock*, 424 U.S. 828, 836 (1976). However, free public access is a significant factor to consider when determining if a particular government property is or can become a public forum. Here the Air Force invited the general public onto an otherwise closed military base for public relations purposes. Even people with prior "ban and bar" letters were admitted (Vol. II, 11:16-22). Nearly 130,000 people accepted the invitation.

It is also true that "merely because speech activities occur at a particular place does not automatically convert a government facility into a public forum." *U.S. Postal Service, supra*, at 130 n. 6. However the propaganda of the Air Force and some of its invitees contrasts sharply with the government silence and complete content neutrality upheld in *U.S. Postal Service.*

In *Greer v. Spock*, 424 U.S. 828 (1976), this Court rejected an attempt to create a political platform out of the Fort Dix basic training base. Spock wished to campaign among the basic trainees. The base commander did not want to disrupt his mission of training soldiers to accommodate Spock. Here the Air Force has already converted the base into a platform from which it may speak to the civilian audience. The Air Force gave non-military speakers access to the same forum. The base

commander has accommodated his primary mission of defending the United States to the presence of 129,000 visitors on certain portions of the base. Petitioners did not seek to speak with the military personnel at the base. Petitioners sought to address the civilian guests. Petitioners sought to talk about the same issue addressed by the Air Force and some of the other speakers. Further, no one has ever contended that petitioners' literature posed any threat to the good order, loyalty, or discipline of the military personnel or to the mission of the base.

The Court of Appeals found no public forum, in part, because the message conveyed by the Air Force was not its own. Rather, the ideological message reflects an "ideology which is developed and controlled under our Constitution by civilians." *Persons for Free Speech at SAC, supra,* at 1017. By adopting a military base at which to peddle its ideological wares, the government has created a public forum where it must risk that some listeners may not agree with the Air Force's message.

The Air Force created a temporary public forum during the open house for those portions of the base open to the public. The Court of Appeals' public forum test is inconsistent in principle with the test used by the other circuits.

3. AFR 190-5 violates procedural due process.

The Air Force has sought to rely on AFR 190-5, at least in part, to sustain its actions below. The regulation violates procedural due process. In *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546 (1975), this Court reversed a municipal decision to deny Southeastern the use of a municipal theatre for a showing of the rock

musical "Hair." This Court held that prior restraints bear a heavy presumption of unconstitutionality. The censor bears the burden of disproving this presumption. *Buckley v. Valeo*, 424 U.S. 1 (1976). The censor must initiate review procedures. The restraint can only be for a short period of time in order to preserve the status quo. Finally, a prior restraint will be held invalid where there is no prompt judicial review of any final action. AFR 190-5 provides none of these procedural protections. It operates as a prior restraint on petitioners' First Amendment activities to the extent that the base commander seeks to rely upon it in denying petitioners' access to the open house.

Petitioners repeatedly offered to comply with any reasonable time, place, manner restrictions imposed on the other non-military invitees. Instead, the Air Force and respondents McKone and Trout excluded petitioners from any participation in the open house. This exclusion violates petitioners' right to due process of law.

4. The Court of Appeals was sharply divided on these important questions of law.

The Court of Appeals heard this case *en banc*. The Court split 5-3. The division concerned fundamental questions of law, rather than disputes on factual matters. The majority applied a historical test to determine the nonexistence of a public forum. The dissenters applied an incompatibility test, used by several other courts of appeal. The dissenters found the open house to be a public forum. The majority held, in effect, that a military base commander need not act in a content neutral manner in excluding speakers from an open house. The dis-

senters argued that content neutrality is an independent principle of First Amendment law, violated by the Air Force in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1608

PERSONS FOR FREE SPEECH AT SAC, ANNE ELSE,

Appellants,

vs.

UNITED STATES AIR FORCE, COL. JOHN R. McKONE, MAJ. GARY TROUT, in their official capacities,

Appellees.

Appeal from the United States District Court
for the District of Nebraska

Submitted: November 9, 1981
Filed: April 28, 1982

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON,* HENLEY, McMILLIAN and ARNOLD, Circuit Judges, en banc.

ROSS, Circuit Judge.

Persons for Free Speech at SAC and Anne Else, appellants, appeal an order of the district court[1] which held

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*Judge Stephenson took senior status effective April 1, 1982. Prior to that date he heard oral arguments in this case and concurred in the majority opinion.

[1]The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

that the United States Air Force could constitutionally refuse to allow appellants to participate in the annual open house held at Offutt Air Force Base near Bellevue, Nebraska. We affirm.

I. Background

Offutt Air Force Base (OAFB) is a military installation which, among other things, serves as the headquarters for the Strategic Air Command. OAFB is a closed base and entry by nonmilitary persons requires the advance permission of the base commander. The base is entirely enclosed by a fence and guards are posted at each entrance.

OAFB holds an annual open house and on that day members of the public are allowed to enter certain designated areas of the base. An open house has been held for at least the past six years and has been attended by as many as 250,000 people. The open house includes aerial demonstrations, static displays of aircraft and military equipment, military bands and drill teams, and information and recruiting booths manned by the Air Force, Navy, Marine Corps and Coast Guard. Some nonmilitary organizations are also allowed to participate and are assigned booths at the open house. The nonmilitary groups include current defense contractors, local public service organizations and public safety concerns.

The 1981 open house was scheduled for June 14, 1981, and the operations plan for the open house stated the event would be used "to show the community the relationship between national objectives and the missions of various Offutt organizations." The plan also noted that the

open house would be used as a "favorable environment" for recruitment. By letter dated May 21, 1981, the appellants requested permission to participate in the open house "to present an alternative to the extremely dangerous and costly arms race." Appellants' amended complaint states that they "seek to speak to the propriety of nuclear proliferation, bilateral disarmament, the conversion of the weapons of war to instruments of peace, and the very existence of OAFB in our community." Appellants' letter stated that they were willing to comply with time, place and manner requirements and their tentative plans for participation included a slide show, clowns, theatre, leafleting, musical songs and peace literature.

By letter dated May 29, 1981, the base commander denied appellants' request to participate, stating that "[y]our organization's proposed activities would not be in keeping with the purpose of the Open House program."

On June 11, 1981, the appellants sought declaratory and injunctive relief in federal district court. Following a hearing the district court on June 12th denied appellants' request for a preliminary injunction allowing them to participate in the open house.

On June 13, 1981, Chief Judge Donald P. Lay of this court held a hearing on appellants' expedited appeal. Chief Judge Lay convened a three-judge court by telephone, the other judges included were Judge Gerald W. Heaney and myself. Later on June 13, 1981, Chief Judge Lay issued an order which held, in pertinent part:

> In view of the time element and the limited record this court finds it would be improvident to grant injunctive relief at this time.

In so ruling, this court recognizes that at issue here is not only the immediate relief for plaintiffs to appear at the Open House scheduled for tomorrow, June 14, 1981, to exercise their alleged right to free speech, but also the more basic underlying challenge to the Air Force Regulations which provide a total ban to any kind of political speech on the Air Base at that time or any other time. In denying relief, this court does not in any way pass on the merits of the claim nor do we pass on the probability of success of the plaintiffs to their claim. * * *

In view of this order we remand to the district court, with directions that plaintiffs' complaint be amended to reflect the challenge against the particular Air Force Regulations involved. This we deem necessary to avoid the issue of mootness as it might relate to the occurrence of a past event, to-wit, the Open House, scheduled tomorrow at the Air Base. The complaint should be amended within two weeks and the government should file its response in the district court within a reasonable time, not to exceed fourteen days. The parties thereafter should be given a reasonable time to supplement the record with additional evidence, including

(a) evidence as to what specific organizations had or may have booths at the Open House and what specific signs or literature were or may be displayed or distributed;

(b) evidence as to what specific literature and other speech forms the plaintiffs attempted to distribute or display at the Air Force Open House of June 14, 1981.

The district court within 60 days of this order, assuming the record is complete, should thereafter enter its final judgment. The court is requested to specifically address the issues as to: (a) whether the defendants have waived their right to ban all forms of free speech during public demonstrations

such as the Open House; and (b) whether defendants have discriminated against the plaintiffs in view of the recognition given to other organizations to have booths and distribute literature; and (c) whether plaintiffs' distribution of literature vis-a-vis public speeches and demonstrations may be banned without a finding by the Command of the Air Force that it would disrupt the discipline and morale of its troops. In addition to the above, the court should, of course, address any other issues raised by the parties.

On the evening of June 13th, the appellants petitioned the United States Supreme Court for a preliminary injunction. The petition was denied by Justice Blackmun.

II. The Decision of the District Court

On August 3, 1981, the district court held a bench trial and on September 23, 1981, issued its memorandum opinion.

The findings of fact by the district court outline four types of groups who had been allowed to maintain booths and distribute literature at the 1981 open house:

> The first group included organizations that provided support services to those in attendance at the open house. For the most part, they operated refreshment concession stands and first aid stations. The second group was comprised of organizations that play an integral role in the function of the military, such as the various military service outfits attached to OAFB, recruiters, and defense contractors. Among the third group were several organizations indicative of community involvement by OAFB personnel in the City of Bellevue, Nebraska, such as the Chamber of Commerce and Big Brothers/Big Sisters. The fourth and final category of participants was comprised of safety-oriented concerns. For example, the Coast Guard handed out material on safe boating, and the Nebraska Highway Patrol distributed safe driving manuals

All the literature distributed by the various groups at the open house was reviewed by the district court. The district court found that the literature distributed by military service branches was "for the most part designed to serve recruiting needs." As for the literature distributed by three defense contractors the court found that it "was quite narrowly confined to present facts and figures about aircraft and weapon systems that they were currently supplying to the Air Force * * * [and] they were not allowed to distribute literature promoting their consumer products or public relations material regarding their corporations." The community groups "disseminated information promoting their various activities." The Chamber of Commerce "distributed tourist-oriented pamphlets * * *." Other community groups who participated included such groups as Big Brothers/Big Sisters, Volunteers in Diversion and Advocacy [a youthful offenders program], and a model airplane club.[2]

The district court also reviewed the literature which the appellants wanted to distribute at the open house. The literature reviewed included a reprint of a lecture by former World Bank President Robert S. McNamara, a flyer advertising a CBS documentary on nuclear warfare, a flyer stating "it will be a great day when our schools get all the money they need and the air force has to hold a bake sale to buy a bomber" and copies of an essay on the nuclear arms race and Christian morality. There is no evidence that the Air Force was given appellants' litera-

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[2]There is also evidence in the record that a base sanctioned Black Awareness program was allowed to share a booth with the base's explorer scout troop. In the words of the base commander the program "was set up by a group of volunteers on Base, members of our Social Actions office on Base."

ture to review prior to the denial of a booth at the open house. And as noted by the district court, "there was no finding by the Air Force command that the literature sought to be distributed by the plaintiffs presented any threat to the loyalty, discipline, or morale of the troops stationed at OAFB."[3]

In his conclusions of law, the district court judge rejected appellants' claim that the open house created a "temporary public forum." In so doing, Judge Schatz relied on the Supreme Court's decision in *Greer v. Spock*, 424 U. S. 828 (1976). The district court then, as requested by this court, reviewed Air Force Regulation 190-5 ("Air

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[3]The district court also supplemented the record with findings concerning actions taken toward certain of appellants' members at the open house.

The OAFB's chief of security had instructed gate sentries that civilians with signs, buttons or clothing that were "political" or "ideological" in nature should not be allowed on the base. One of appellants' members was denied permission to enter the base because his T-shirt contained the slogan "No Nukes in the Breadbasket." Another member was permitted to enter the base after a decision by the chief of security that a T-shirt with the slogan "Jobs, Not Bombs" was not "sufficiently political." Other members of appellants' organization were denied permission to enter until they removed buttons or messages taped to their clothing. Appellants' amended complaint which was filed following the open house did not raise as an issue the restriction placed on "clothing" messages, rather appellants sought participation in the open house as a group. However, we will address these restrictions in footnote 9 of this opinion.

The district court also found that several members of appellants' group were removed from the base chapel after attending a Roman Catholic Mass "because it was not part of the area open to the public that day * * *." "Ban and Bar" letters were issued to these persons and they were escorted off base.

We will also address this action in footnote 9 of this opinion.

Force Participation in Public Events") and found the regulation to be a permissible subject matter regulation which had been "objectively and even handedly administered." Judge Schatz emphasized that appellants had not shown "that any other political or ideological organization with views presumably more favorable to OAFB's military mission was allowed to participate in the open house event." The district court also held, based on *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) that the Air Force need only provide a rational basis for excluding certain groups because the base is not a public forum. Judge Schatz held that the basic premise behind the Air Force regulation is the same here as in *Greer v. Spock* "to-wit, keeping official military activities on the base completely free of entanglement with partisan political or ideological controversies of any kind."

The district court rejected appellants' contention that the various military outfits and defense contractors were at the open house to convey a political or ideological viewpoint and thus appellants should be given equal access to express their markedly alternative views. The district court held that although the terms "political" and "ideological" do not lend themselves to precise definitions, he believed that under a "practical, common sense" definition the "blandly informative displays" of the military service branches and defense contractors could not be considered political or ideological.

In considering the literature the appellants wished to distribute, the district court held "that the entanglement rationale * * * is just as valid and meaningful with regard to political and ideological speech in written form as it is with regard to that type of speech in verbal form."

III. Public Forum

In *Greer v. Spock*, 424 U. S. 828 (1976) the Supreme Court upheld the constitutionality of a ban on political speeches at a military base. A key determination in that case was that the military base was not a public forum. The Supreme Court held that "[t]he notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is • • • historically and constitutionally false." *Id.* at 838.[4]

The appellants contend that although OAFB may be a closed base and thus not a public forum on every other day of the year, the annual open house creates a "temporary public forum." A public forum is created, appellants argue, by inviting the public and conveying to them a message that appellants find objectionable, i. e., here is our mission, as a community you should like and appreciate us. Thus, appellants believe that the Air Force must "risk" a response to the message in the forum. Due to the Air Force's alleged "speech," appellants assert that there has been an abandonment of both the Air Force's primary mission and its claimed neutrality on ideological issues resulting in abandonment of a normally non-public forum.

As noted by the district court, there is no case law which supports the concept of a "temporary public forum." The Supreme Court has rested its "public forum" analysis

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[4]The Supreme Court recently reaffirmed its adherence to the "public forum" distinction in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 49 U. S. L. W. 4813 (U. S. June 25, 1981).

on considerations of the historical and traditional uses of the relevant government property. *See United States Postal Service v. Council of Greenburgh Civic Associations*, 49 U.S.L.W. 4813, 4817-18 (U.S. June 25, 1981) (mail boxes); *Greer v. Spock, supra*, 424 U.S. at 838 (military base); *Adderley v. Florida*, 385 U.S. 39, 41 (1966) (jail). The question, therefore, is whether the open house is such a deviation from the historical and traditional uses of OAFB so as to create a public forum. We hold it is not.

In *Greer v. Spock, supra*, 424 U.S. at 836, the Supreme Court rejected *"the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment."* (Emphasis supplied.) The Supreme Court also discussed the case of *Flower v. United States*, 407 U.S. 197 (1972) in which the conviction of a civilian for leafleting on a street within a military base was summarily reversed. The Court in *Greer v. Spock* distinguished the *Flower* case as one involving an open street, which was similar to all others in the city and in which the military had abandoned any special interests in civilian traffic. *Greer v. Spock, supra*, 424 U.S. at 835.

We reject any argument that the size of the civilian audience which chose to attend the open house reflects an abandonment of military control over the base property. The detailed operations plan for the event and the concerns it reflects for security, traffic flow and personnel are inconsistent with a one-day abandonment.

The appellants also believe the "speech" in which the Air Force was involved created a public forum. Appar-

ently, appellants believe that fostering good community relations and seeking public approval of their mission is nontraditional speech through which the military abandons control over OAFB. We disagree.

While the primary mission of the Air Force may be the defense of the United States, this does not mean that good relations between a military base and the community in which it exists is not legitimately supportive of that mission. In *Greer v. Spock, supra,* 424 U. S. at 838 n. 10, the Court noted that:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

We have no problem characterizing a military base's open house as "supportive of the military mission."[5] While not decisive to our decision, it is relevant that Air Force Regulation 190-5 sanctions and even encourages the type

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[5]The term "supportive of the military mission" could admittedly be used to justify almost any "speech" by the military. But to condone a military base's open house as within the traditional sphere of military activities is not to say that the courts (and other branches of the government) would approve speech by the military which is clearly outside traditional military affairs.

of "speech" that occurs at the open house.[5] Air Force Regulation 190-5 entitled "Air Force Participation in Public Events" provides:

> a. Participation is authorized, encouraged, and essential, within the limits defined in this regulation, to:
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> (1) Inform the public on Air Force preparedness and promote national security;
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> (2) Demonstrate US partnership with allies in collective security;
>
> (3) Develop public understanding of the Air Force mission;
>
> (4) Assist Air Force personnel procurement programs; and
>
> (5) Aid community relations. Commanders at all levels will give positive emphasis to the importance of good community relations in the execution of their missions.

AFR 190-5 (3) (a). The regulation's definition of "community relations" is also noteworthy:

> j. Community Relations. The relationship between the base and civilian community.
>
> (1) *Community Relations Area*—the geographical area wherein Air Force facilities and/or personnel have a social or economic impact on the populace.
>
> (2) *Community Relations Program*—that command function which evaluates public attitudes, *identifies the mission of a military organization with the public interest, and executes a program of action to earn public understanding and acceptance.* Commu-

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[5] In Part V of this opinion, we have rejected arguments that the regulation is unconstitutional on its face or in its application.

nity relations programs are conducted at all levels of command, both in the United States and overseas, by military organizations having a community relations area of responsibility. Community relations programs include, but are not limited to such activities as:

(a) Air Force participation in international, national, regional, state, and local public events,

(b) *Installation open houses* and tours and orientation tours for distinguished civilians.

(c) Humanitarian acts.

(d) Cooperation with government officials and community leaders.

(e) Encouragement of Air Force personnel and their dependents to participate in all appropriate aspects of local community life.

AFR 190-5 (2) (j) (emphasis supplied).

Our holding is simply that the open house is within the range of traditional military activities and thus no public forum was created. That appellants believe that the Air Force's "message" was also ideological does not change this result. As summarized by the district court, the "message" objected to is "that a high technology, nuclear-oriented military system is a viable way for the United States to conduct itself in world affairs." But to argue that the "ideological message" appellants "heard" at the open house somehow transformed OAFB into a public forum and into a nuclear advocate is to ignore the traditional role of the military under our Constitution.

In *Parker v. Levy*, 417 U.S. 733, 751 (1974) the Supreme Court noted that:

The military establishment is subject to the control of the civilian Commander in Chief and the civilian de-

> partmental heads under him, and its function is to carry out the policies made by those civilian superiors.

Civilians, our President and Congress make the "ideological" decisions for the military. Where the military stands today may be an ideological controversy and even more so where the military will be tomorrow. But the debate on such controversies is for civilian forums not military bases.

To the extent that the Air Force's display of its current state in terms of weapons systems and aircraft reflects an "ideology," it is an ideology which is developed and controlled under our Constitution by civilians. It is our elected officials who develop the "ideology" which the Air Force is *required* to carry out. The decisions on the military's current and future state do not historically or traditionally occur on military bases.

Reiterated in *Greer v. Spock* is the principle that "'[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Greer v. Spock, supra*, 424 U. S. at 836, quoting *Adderley v. Florida*, 385 U. S. 39, 47 (1966). This military base and others are "lawfully dedicated" to carrying out the decisions of our civilian government. The argument that the military has abandoned its ideological neutrality is based on the false premise that the military itself can pick and choose under our Constitution the "ideology" it wishes to carry out. No public forum can arise from the "ideological" reflection of the current state of the military because historically, traditionally and constitutionally this "reflection" is mandated by the civilian sector.

While we believe that the military may have been involved in "speech" in pursuing its community relations effort, we refuse to label the "ideological message" the appellants heard as the military's "speech." If there is "speech" involved in the "ideological message" it is attributable to our civilian government. If the label "government speech" were applied to this message we would still hold that there is a legitimate governmental interest in the "speech" and no public forum is created. *See generally:* Shiffrin, *Government Speech,* 27 UCLA L. Rev. 565 (1980). The governmental interest which is served by the open house, beyond any "ideological message," is that the government is showing its citizens, who pay for the military, how it is spending their money.

As Justice Rehnquist emphasized in *United States Postal Service v. Council of Greenburgh Civic Associations, supra,* 49 U. S. L. W. at 4818 n. 6:

> Justice Brennan's analysis assumes that simply because an instrumentality "is used for the communication of ideas or information," it thereby becomes a public forum. Our cases provide no support for such a sweeping proposition. Certainly, a bulletin board in a cafeteria at Fort Dix is "specifically used for the communication of information and ideas," but such a bulletin board is no more a "public forum" than are the street corners and parking lots found not to be so at the same military base. *Greer v. Spock,* 424 U. S. 828 (1976). Likewise, the advertising space made available in public transportation in the City of Shaker Heights is "specifically used for the communication of information and ideas," but that fact alone was not sufficient to transform that space into a "public forum" for First Amendment purposes. *Lehman v. City of Shaker Heights,* 418 U. S. 298 (1974). In fact Justice Blackmun recognized in *Lehman* that:

> "Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Id.*, at 304.

IV. Equal Protection

The appellants argue that by allowing other civilian organizations to obtain booths at the open house while denying their request for a booth is a violation of their right to equal protection of the law.

In *United States Postal Service v. Council of Greenburgh Civic Associations, supra,* 49 U. S. L. W. at 4818 n. 7, the Supreme Court stated that:

> What we hold is the principle reiterated by cases such as *Adderley v. Florida,* 385 U. S. 39 (1966), and *Greer v. Spock,* 424 U. S. 828 (1976), that property owned or controlled by the government which is *not* a public forum may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment. Admittedly, the government must act reasonably in imposing such restrictions, *Jones v. North Carolina Prisoners' Labor Union,* 433 U. S. 119, 130-131 (1977), and the prohibition must be content-neutral.

In *Jones v. North Carolina Prisoners' Labor Union* the Court upheld the discretionary decision of prison officials to bar the operation of a prisoners' union within a state prison while at the same time allowing such groups as Alcoholics Anonymous and the Jaycees to operate within the prison.[7] The Supreme Court held that:

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[7]While we dislike the comparison of military bases to prisons, we note that in *Jones v. North Carolina Prisoners' Labor Union,* 433 U. S. 119 (1977), Justice Rehnquist used the military base in *Greer v. Spock,* 424 U. S. 828 (1976) as a comparison to the state prison in his analysis.

> It is precisely in matters such as this, the decision as to which of many groups should be allowed to operate within the prison walls, where, confronted with claims based on the Equal Protection Clause, the courts should allow the prison administrators the full latitude of discretion, unless it can be firmly stated that the two groups are so similar that discretion has been abused.

Id. at 136.

The deference the courts should give prison administrators' decisions is also viable to a lesser degree when dealing with the discretion to be afforded to a military base commander, and the Supreme Court has recognized the historical basis for such discretion in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 892-93 (1961). It relied in part on the following quotation:

> "It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J. A. G. 267 and cases cited)." JAGA 1925/680.44, 6 October 1925.

Id. at 893. *See also Rostker v. Goldberg*, 49 U.S.L.W. 4798, 4800-01 (U.S. June 25, 1981).

The reason given by the base commander for denying appellants' request for a booth was "[y]our organization's proposed activities would not be in keeping with the purpose of the Open House program." The purpose of the open house was, according to the operations plan, "to show the community the relationship between national objectives and the missions of various Offutt organizations."

The distinction made between other civilian groups and appellants' organization is reasonable in view of the purpose of the open house.

Many of the "civilian" groups which were given booths were, in fact, base-sanctioned, private organizations composed mostly of base personnel and their dependents. The record indicates that base-sanctioned organizations included the Explorer Scouts, Big Brothers/Big Sisters and the Black Awareness Program. The civilian groups who received booths but were not apparently "base-sanctioned" included the Bellevue Chamber of Commerce, defense contractors and safety groups[3] The Chamber of Commerce handed out literature on the Bellevue, Nebraska, area and information on Fontenelle Forest, a nature preserve in Bellevue. The Chamber of Commerce's participation is reasonably related to the purpose of the open house, i.e., community relations. The defense contractors provided literature and information about aircraft and weapon systems *currently* being supplied to the Air Force. The display and operation of aircraft was quite obviously a major part of the open house program. That the Air Force allowed contractors to provide, in the words of the district court, "blandly informative displays," was also reasonably related to the open house program. One key factor which distinguishes

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[3]Appellants argue that they are similar to all other non-military invitees to the open house. However, the appellants focus on their alleged similarity to the defense contractors. Appellants have not specifically argued that their organization is similar to the safety-oriented groups, such as the Nebraska Highway Patrol and the Civil Air Patrol. But we note that appellants would be hard-pressed to show a similarity in the subject matter of their group and the safety-oriented groups.

the defense contractors from the appellants' organization is that these corporations are heavily involved in day-to-day activity on the base. The record reflects that there is a close working relationship between the Air Force and these corporations in the supplying and servicing of equipment. It is of considerable importance to us that the contractors were strictly limited to the display of and information on equipment being currently supplied to the Air Force. In fact, one contractor who was involved with a proposed weapon system did not participate.

With the exception of the Chamber of Commerce and the safety-oriented groups, the remaining "civilian" groups were associated with the every day life and work at OAFB. Under *Jones v. North Carolina Prisoners' Labor Union, supra,* 433 U.S. at 136, it cannot "be firmly stated that the two groups [appellants versus the non-military participants] are so similar that [the base commander's] discretion has been abused." We hold that the base commander's decision to allow only civilian groups whose activities were "in keeping with the purpose of the open house," which purpose was to foster good community relations, was not an abuse of discretion.

There are "narrow circumstances" in which the government may regulate the "subject matter" of speech. *See Consolidated Edison v. Public Service Commission,* 447 U.S. 530, 538 (1980). In *Jones v. North Carolina Prisoners' Union, supra,* 433 U.S. at 134, the Supreme Court allowed prison officials to limit access to the prison to groups which "were seen as serving a rehabilitative purpose, working in harmony with the goals and desires

of the prison administrators, and [the groups] had been determined not to pose any threat to the order or security of the institution." Similarly, we hold that the base commander could limit access to those groups that he viewed as related to the purpose of the open house.

The record also reflects that Colonel McKone, the base commander, believed that there would be problems with keeping order during the open house if appellants were allowed to participate. Colonel McKone testified that:

> A. Well, as the Installation Commander on the Base, I am also the convening authority for all the court martial actions, also you might say the Chief of the Security Police on the Base, I have the responsibility of maintaining the safety and security of everybody on that installation. During the period of an Open House like this, I have to consider that we are to have anywhere from 150,000 to maybe a quarter of a million people on the Base at one particular time. If a group like this was approved to come on the Base and there were other people who violently disagreed with that group, I would, in turn, I'm sure, have to protect this group from those other individuals. I had to consider that. Reverend Rupiper [a member of appellants' organization] mentioned during his discussion that this particular group when they were just standing outside the gates and praying was continually harassed. This was certainly not an organized attempt on our part, but the feeling of the people that live and work on the Base. Certainly, this group has not been popular with many people on the Base and I have to consider what would happen by bringing them on the Base, letting them go do their thing, unquote.

The Supreme Court in *Jones v. North Carolina Prisoners' Labor Union* specifically held that in a nonpublic

forum "these reasonable beliefs • • • are sufficient." *Id.* at 136. The Court also noted that "[t]he District Court's further requirement of a demonstrable showing that the Union was in fact harmful is inconsistent with the deference federal courts should pay to the informed discretion of prison officials." As indicated earlier, we believe this same deference must be afforded to a base commander. And the base commander may limit access to those groups whose "subject matter" is consistent with the purposes of the open house.[9]

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[9]While we hold that the base commander's reasonable beliefs are sufficient to deny appellants' request to participate as a group in the open house, we are compelled to note our concern with attempting to regulate "clothing" messages of individual persons entering the open house. See footnote 3, *supra*.

In *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969) the Supreme Court held that the first amendment protected the right of high school students to wear black armbands to protest America's involvement in Vietnam. The Court stated that this symbolic speech is "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06 (citations omitted). But it was also emphasized that the case factually "was entirely divorced from actually or potentially disruptive conduct by those participating in" the speech, *id.* at 505, and the case did "not concern aggressive, disruptive action or even group demonstrations." *Id.* at 508.

Based on *Tinker* we do not believe that the Air Force can constitutionally regulate "clothing" speech of individual members of the general public, including members of appellants' organization. On the day of the open house appellant did demonstrate outside the front gate of the base as a group. But there was no evidence appellants attempted to enter the base as a group or entered the base individually and later attempted to stage a group demonstration. This type of group activity could be restricted based on the purpose of the open house and the reasonable beliefs of the base commander that there would be a disturbance.

(Continued on following page)

V. Air Force Regulation 190-5

This regulation entitled "Air Force Participation in Public Events" was cited by the base commander in his letter which denied appellants' request to participate in the open house. The Air Force has argued, however, that their refusal to allow appellants' participation was also justified under the regulation. We agree that the regulation does provide support for the Air Force's refusal, although the denial of appellants' request to participate can be upheld, as indicated in Part IV of this opinion, based on the discretion of the base commander and the purpose of the open house.

The Air Force argues that the appellants' organization is an "ideological" group which must be barred from the base under Section (3)(d) of AFR 190-5. That provision of the regulation provides:

(Continued from previous page)

While we believe individual "clothing" messages should be allowed, *Tinker* also stands for the proposition that "facts which might reasonably have led [the base commander] to forecast substantial disruption of or material interference with [the open house] activities" would give to him the discretion "to deny [an individual's] form of expression." *Id.* at 514. We also note that it is within the base commander's discretion to admit or deny admittance to the open house to people who have previously been issued valid "ban and bar" letters, whether issued that day or at some earlier time. However, as indicated in footnote 3, *supra*, the appellants' amended complaint did not request any relief as to these acts and therefore it was unnecessary for the district court to provide individual relief.

We do wish to emphasize that the arbitrary exercise of this discretion can not be condoned. The issuance of "ban and bar" letters to those who attended Mass at the base chapel is invalid based on the record before us. There is no evidence that the base chapel was marked "off limits" or that these persons engaged in any disruption during the Mass.

> d. Participation and cooperation MUST NOT directly or indirectly endorse or selectively benefit or favor or appear to endorse or selectively benefit or favor any private individual, group, corporation (whether for profit or nonprofit), sect, quasi-religious or ideological movement, fraternal organization, political organization, or commercial venture, or be associated with the solicitation of votes in a political election.

Appellants' brief claims that the regulation is unconstitutional on its face, however, at oral argument appellants also asserted unconstitutional application of the regulation.

The argument that the regulation is unconstitutional on its face is basically the same argument raised on the public forum issue. The argument is that because the military has engaged in "speech" on an ideological issue, it can not deny equal access to appellants based on a desire to stay free of "entanglement" with ideological issues.

In Part III of this opinion we recognized that the military's community relations activities may be classified as "speech," but we rejected the argument that the military was engaged in "ideological" speech. However, that the military itself may "speak" through its community relations activities does not destroy the governmental interest served in forbidding the military from becoming entangled with non-military "ideological movements." As the regulation explains:

> (1) Included among the organizations which may not be selectively benefited or favored are: Religious and sectarian groups; fraternal organizations, such as the Knights of Columbus, Loyal Order of the Moose, or B'nai B'rith; and quasi-religious or ideol-

> ogical movements or organizations, such as Moral Rearmament, "Sing Out," and "Up with People."

To us there is a vast difference between allowing the military to "speak" in an effort to foster base/community relations and allowing the military to throw the weight of its resources behind a non-military ideological movement. The "entanglement" rationale we believe is still viable when dealing with military endorsement or support of non-military ideological movements. The district court found that "no other easily identifiable political or ideological group even asked to participate in the 1981 open house • • • ." And we agree with the district court that the rationale of *Greer v. Spock* regarding non-involvement of the military in partisan politics is also applicable to non-involvement of the military in civilian ideological movements. In his concurring opinion in *Greer v. Spock,* Justice Powell emphasized that involvement of the military in politics could undermine public confidence in civilian control of the military, a constitutionally mandated requirement. *Greer v. Spock, supra,* 424 U.S. at 845-46. the same can be said for barring military involvement in civilian ideological controversies.

As emphasized in Part III of this opinion the debate on controversies regarding our military is for civilian forums not military bases. The military can obviously tell its civilian leaders what "ideological" decisions it favors. But what the military cannot do is influence public opinion on those decisions by endorsing or supporting civilian groups whose ideology they may favor. This would "entangle" the military in controversies that must be decided under our Constitution by civilian officials and it would definitely undermine public confidence in civilian control of the military. An analogy may be helpful.

Many would characterize the controversy regarding whether to register women for the draft as an "ideological" controversy which affects the military. The military may tell the President and Congress what its opinon is on the controversy; but Congress was the decision-maker on the controversy. If the military allowed on base civilian "ideological" groups whose views on the controversy the military might favor, the military would be "entangling" itself in the controversy to a degree inappropriate to a "civilian-run" military. It is quite obvious that if the military does not allow "one side" of the controversy on base, it has no obligation to allow the "other side."

We also reject appellants' contention that the regulation was unconstitutionally applied, in that defense contractors were allowed booths while appellants were not. To characterize the defense contractors' displays as "ideological" is to ignore the fact that they were only showing the "current state" of the Air Force. The contractors were not at the open house to debate the current or future state of the military but rather to show the current state.

If there is an "ideology" present in the current state of the Air Force's equipment, it is an ideology imposed by the decisions of our civilian government. To attempt to label the defense contractors' displays as an "ideological movement" under the regulation is to distort the fact that defense contractors do not "choose" how the military will be equipped.

We hold that the regulation has been consistently and even-handedly applied as to "ideological movements"

and it is thus constitutional as applied as well as on its face.

VI. Distribution of Literature

After being denied a booth at the open house, appellants sought permission to distribute literature and leaflets at the open house. Apparently the Air Force did not review or evaluate this literature.

The district court found that the ban on distribution of literature was consistent with the policy behind Air Force Regulation 190-5, that is, noninvolvement of the military in ideological movements. We agree with the district court but add the following comments:

The initial request for participation by appellants included "leafleting" and "peace literature" among their activities. To deny appellants' request for a booth quite obviously was a denial of any request to leaflet throughout the crowd. And there is no evidence that any other non-military group was allowed to distribute any literature outside of a booth. *See Heffron v. International Society for Krisha Consciousness*, 49 U. S. L. W. 4762 (U. S. June 22, 1981). Since OAFB is a "closed base" we must assume that civilians are not normally allowed to come on the base to leaflet, and appellants have offered no evidence that general leafleting is allowed.

VII. Conclusion

OAFB is not a public forum during its annual open house. The military may legitimately use its property to foster community relations. The Air Force did not violate appellants' right to equal protection when it rea-

sonably limited groups participating in the open house to those whose activities were consistent with the purpose of the open house. Additionally, the Air Force may deny access to appellants because they are an "ideolgical movement" under Air Force Regulation 190-5. In summary we note that the Supreme Court has made clear that "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *Greer v. Spock, supra,* 424 U.S. at 836, quoting *Adderley v. Florida, supra,* 385 U.S. at 48.

The judgment of the district court is affirmed.

Judges Bright, Stephenson, Henley and Arnold concur in this opinion.

HEANEY, Circuit Judge, dissenting, with whom LAY, Chief Judge, and McMILLIAN, Circuit Judge, join.

We agree with the majority that the annual open house at OAFB falls within the traditional sphere of military activities and serves legitimate military purposes.[1] Indeed, the right of the Air Force to hold this event has never been in dispute. The Air Force, however, permits defense contractors and other non-military groups to assemble booths and distribute literature at the open house. Having done so, the issue is whether it can then prohibit

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[1]We also agree with the majority insofar as it holds that the Air Force cannot constitutionally regulate the speech content of clothing worn at the open house or issue "ban and bar" letters to those who attended Mass at the chapel.

the appellants from distributing, in the same manner,[2] literature which is critical of current defense policies.

We cannot accept such selective exclusion, for two important reasons. First, the regulation on which the Air Force relied to deny appellants access to the open house was not applied in a content-neutral manner. Civilian groups engaged in ideological and commercial activity were permitted to participate in the open house to their benefit, while appellants were denied the same opportunity—a discrimination that violates Air Force Regulation (AFR) 190-5 and the First Amendment. Second, and apart from any regulation, the Air Force conducted the open house in a manner which created a public forum, such that it was constitutionally impermissible to deny the appellants the right to distribute literature at the one-day forum. In addition, regardless of whether a public forum was created, the ban on appellants' literature distribution was inconsistent with the "clear danger" standard which the Supreme Court has applied to literature restrictions on military bases. The applicability of the "clear danger" standard, however, is an open question which we need not reach because, in our view, the Air Force's actions are plainly unconstitutional on the two foregoing grounds.

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[2]The appellants have repeatedly expressed to the Air Force their willingness to submit to reasonable time, place and manner restrictions on the same basis as the other nonmilitary groups. The appellants also described to the base commander the nature of their literature (prior to the open house) and introduced at trial specific examples of the literature that would be distributed. Neither the base commander nor the district court have contended or found that distribution of such literature would pose a danger to military loyalty, discipline or morale.

A.

AFR 1905(3)(d) WAS NOT APPLIED IN A CONTENT NEUTRAL MANNER.

AFR 190-5(3)(d) prohibits the Air Force from using its open house to "directly or indirectly endorse or selectively benefit or favor or appear to endorse or selectively benefit or favor any private individual, group, corporation (whether for profit or nonprofit) • • • or ideological movement • • • or commercial venture • • • ." The Air Force violated this regulation by permitting defense contractors to participate in and benefit from the open house—in both commercial and ideological capacities—while denying the appellants the same opportunity. This selective exclusion of the appellants is a facial violation of the Air Force regulation.[3]

Moreover, the violation is of a constitutional dimension. Even assuming the open house was not a temporary public forum, any governmental regulation of speech nonetheless must be reasonable and content neutral. *United States, Postal Service v. Greenburgh Civic Association*, — U. S. —, 69 L. Ed. 2d 517, 531-532 & n. 7 (1981). Here, AFR 190-5 was not applied in a content-neutral manner. Defense contractors, a vital link in the defense establishment, were permitted to participate in the open house. The appellants, opponents of current defense policies, were

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[3]We note that the Air Force also violated its regulation by selectively permitting the chamber of commerce and other local nonmilitary groups to participate in and benefit from the open house. Although the participation of such groups is not highly significant, it further underscores the discriminatory character of the Air Force's restriction of appellants' First Amendment rights.

denied the same opportunity. Such discrimiation on the basis of the content of speech is unconstitutional. The "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of Chicago v. Mosley*, 408 U. S. 92, 96 (1972).

The majority does not explicitly address the question of whether the open house selectively benefited the defense contractors in their commercial capacity. It dismisses the commercial aspect by noting that defense contractors provided only "blandly informative displays" of products currently supplied to the Air Force and that the contractors were not permitted to directly promote their consumer goods. This ignores the clear commercial benefit of participating in the open house.

The defense contractors—Boeing, General Electric and McDonnell Douglas—are commercial ventures that supply sophisticated weaponry and equipment to the Air Force. Their presence at the OAFB open house accords them an excellent opportunity to engage in "institutional advertising."[4] Such advertising is aimed at military and civilian officials who participate in defense procurement, as well as everyday consumers who may purchase other products sold by the contractors. In using the open house

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[4]"Institutional advertising promotes organizational images, ideas, and political issues." W. Pride & O. Ferrell, *Marketing—Basic Concepts and Decisions*, at 345 (1977). *See also* Stanton, *Fundamentals of Marketing*, at 414 (1981) ("Institutional advertising is designed to create a proper attitude toward the seller and to build goodwill, rather than to sell a specific product or service.").

to foster the image of being competent producers of high technology products, the defense contractors promote themselves to both their military and nonmilitary customers. These commercial benefits may not strike the majority as significant, but they were sufficiently valuable to attract the commercial contractors in the first instance.

The majority also asserts that the defense contractors were not engaged in ideological speech:

> To characterize the defense contractors' displays as "ideological" is to ignore the fact that they were only showing the "current state" of the Air Force. The contractors were not at the open house to debate the current or future state of the military but rather to show the current state.

Slip op., *supra*, at 13.

We cannot accept this view. The defense contractors have a vital interest in promoting public support for defense policies which emphasize high technology products and weapon systems. Moreover, public confidence in the weapon products is crucial to sustaining the policies which lead to such products. In promoting their current products to the general public at the open house, the contractors are unmistakeably promoting public support for the defense policies on which those products depend. The linkage between the defense industry and military policymaking was forcefully warned of by President Eisenhower in his farewell address two decades ago:

> Until the latest of our world conflicts, the United States had no armaments industry. American makers of plowshares could, with time and as required, make swords as well. But now we can no longer risk emergency improvisation of national defense; we have been compelled to create a permanent armaments industry

of vast proportions. Added to this, three and a half million men and women are directly engaged in the defense establishment. We annually spend on military security more than the net income of all United States Corporations.

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every State house, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.

Public Papers of the President, 1960-1961, at 1038 (emphasis added).

President Eisenhower's warning foreshadowed the present case. The Air Force sponsors an event that attracts hundreds of thousands from the general public; the defense industry is permitted to join and promote its wares to the public, but those who oppose such products and the policies they rest upon are excluded from the event. Stifling one side of the debate is offensive to the

First Amendment, yet the majority approves of such action by concluding that only one side of this debate is ideological. In our view, both the defense industry and its critics bear ideological messages. The Air Force cannot invite the public to the open house and then permit only one side of the national security debate to advance its position.

B.

THE OPEN HOUSE CONSTITUTES A PUBLIC FORUM

Quite apart from any question of compliance with regulations, the Air Force's exclusion of appellants is impermissible under the public forum doctrine. In our view, the Air Force created a temporary public forum at OAFB by conducting the open house in the manner which it did. The Air Force holds its open house at OAFB annually and extends an invitation to the public. The event is attended by well over 100,000 persons each year. Aerial demonstrations, equipment and weaponry displays, and military bands and drill teams are presented for the visitors. Recruiters for the various branches of the armed services are present at the open house. Defense contractors, local public service organizations and public safety groups are permitted to participate and assemble booths to disseminate literature. Refreshment concession stands and other public services are provided on the base. The Air Force diverts equipment and personnel from regular training to instead prepare for the open house. The Air Force's express purpose in staging the open house is "to show the community the relationship between national objectives and the missions of various OAFB organizations."

These factors demonstrate the magnitude of the open house, the large scale of public involvement and the significant participation of nonmilitary groups. From any common-sense perspective, the open house is plainly a public forum.[5] The primary legal requirement for finding a public forum is also met. In public forum analysis, "the crucial question is whether the [proposed] manner of expression is basically incompatible with the normal activity *of a particular place at a particular time.*" *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972) (emphasis added). *Accord, United States Postal Service v. Greenburgh Civic Association, supra*, 69 L. Ed. 2d at 530-531 n. 6 & 534-536 (Brennan, J., concurring; Note, *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 56, 155-156 & nn. 28-34 (1976)). Here, the appellants' proposed literature booth is clearly compatible with the other activities at OAFB during the open house.[6]

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[5]We note that a military base does not become a public forum simply because the public is freely admitted to the base. *See Greer v. Spock*, 424 U. S. 828, 836 (1976). We only conclude that under all the facts and circumstances of this case, the appellants can claim access to OAFB as a public forum for the one day of the open house. We need not reach the question of whether the open house would constitute a public forum if *all* nonmilitary groups were excluded from the event.

[6]Appellants' speech—if subject to the same restrictions applied to other nonmilitary groups—would not interfere with the civilian visitors. Nor would appellants' literature booths interfere with the aerial demonstrations, equipment and weaponry displays, or military bands and drill teams. Moreover, appellants' activities would not disrupt the leafletting by various military and nonmilitary groups. Finally, the appellants, like the Air Force and the participating defense contractors, seek to address the ideological issues concerning OAFB's relationship to local and national objectives and concerns. The appellants,

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Because the open house constituted a public forum, the government must have compelling reasons to restrict appellant's speech. *See Grayned v. City of Rockford, supra,* 408 U. S. at 116-117; *Tinker v. Des Moines Independent School District,* 393 U. S. 503, 506-509 (1969); *United States v. O'Brien,* 391 U. S. 367, 376-377 (1968); Note, *The Supreme Court, 1975 Term, supra,* 90 Harv. L. Rev. at 152-154 & nn. 1, 29-34. Neither the majority herein, the district court nor the Air Force claim that there is a compelling governmental interest that justifies prohibiting appellants' speech.

The majority, relying on *Greer v. Spock,* 424 U. S. 828, 838 n. 10 (1976), asserts that the open house is not a public forum because it "is within the range of traditional military activities." We agree that the open house has now become a tradition. We agree that a primary purpose of the open house is to further current defense policies and, thus, it can be described as a legitimate military activity. The fact that the open house is a traditional military activity, however, does not answer the question of whether it is a public forum. The proper inquiry is not whether the government's use of property is traditional or legitimate but, rather, whether the appellants' proposed

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of course, do not share the Air Force's view of how to best protect our national security; but appellants' speech cannot be considered incompatible with the open house merely because its content conflicts with the Air Force's message. If such an interpretation of incompatibility was adopted, no governmental property would ever be considered a public forum because any proposed speech that the government did not approve of would be incompatible with the government's use of the property.

use is incompatible with the activities at OAFB during the open house.[7] *Greer* does not suggest otherwise.

In *Greer*, the Supreme Court upheld Army regulations which were relied upon to deny political candidates permission to hold a political meeting on a public parking lot at Fort Dix. The Court concluded that the base was not a public forum for the candidates' partisan political speeches because such speeches were fundamentally incompatible with the military's traditional and historical role of training soldiers and remaining politically neutral.[8] *Id.* at 838. *See* Note, *The Supreme Court, 1975 Term, supra*, 90 Harv. L. Rev. at 156.

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[7]The Supreme Court has made it clear that the compatibility question in public forum analysis focuses on the relationship between the speech that is being restricted and the government's use of the public property at the time of the proposed speech. *See United States Postal Service v. Greenburgh Civic Association*, — U. S. —, 69 L. Ed. 2d 517, 530-531 n. 6 & 534-536 (Brennan, J., concurring) (1981); *Greer v. Spock, supra*, 424 U. S. at 837-838 & 843-844 (Powell, J., concurring); *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). *See also* Note, *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 56, 155-156 & nn. 28-34 (1976).

[8]The majority ignores this compatibility analysis in *Greer v. Spock*, 424 U. S. 828 (1976). It misreads footnote 10 in *Greer* which states:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

424 U. S. at 838 n. 10.

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Thus, *Greer* does not create a per se rule that a military base cannot be a public forum under any circumstances. It did hold that, for purposes of partisan speeches on a military base, the public forum doctrine would be construed very narrowly. The Court's analysis, however, was consistent with prior cases that had decided the public forum question by considering all relevant circumstances, including the compatibility of the proposed speech with the government's use of its property. This compatibility analysis was reaffirmed, subsequent to *Greer*, in *United States Postal Service v. Greenburgh Civic Association, supra*, 69 L. Ed. 2d at 517. In that case, the majority, concurring and dissenting opinions all analyzed the public forum question by determining whether the proposed First Amendment exercise was incompatible with the government's use of the public property at the time in controversy. *Id.* at 530-531 n. 6 (majority opinion); at 534-536 (Brennan, J., concurring); at 543-544 (Marshall, J., dissenting).

Moreover, nothing in *Greer* suggests that the appellants' proposed speech at OAFB is incompatible with the military's activities at the open house. In *Greer*, unlike the present case, the plaintiffs sought to speak to soldiers engaged in routine training rather than to the general

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In footnote 10 in *Greer*, the Court was merely noting that prior permission for compatible civilian speakers did not mean that incompatible civilian speech activity must be permitted. This compatibility analysis, of course, did not focus on whether the military approved of the content of the speech, but rather on whether the nature of the activity was incompatible with the functioning of the military base. *See* note 6, *supra*.

public at an open house. Indeed, under *Greer* and by any standard, the appellants' proposed speech activity is plainly compatible with the open house activities as a whole. *See* note 6, *supra*.

The majority also argues that the open house was not a public forum merely because an ideological message was projected by the Air Force. They reason that the Air Force's message, though ideological, reflects an "ideology which is developed and controlled under our Constitution by civilians." Slip op., *supra*, at 12-13, 22-23. Implicit in this reasoning is an admission that the Air Force might well create a public forum if it was projecting its own "military message" rather than a civilian message.

We fail to grasp the logic of the distinction. In either case, it is government speech that is being projected and the impact on the question of whether a public forum is created should be the same. The majority cites to no case in which the validity of military restrictions on speech has turned on the notion that such restrictions were civilian directed. If the government chooses a military base as a forum to project an ideological message to the public and in the process creates a public forum, it must expect that those who do not agree with the message will seek to project their own message from the same forum.

C.

APPELLANTS' LITERATURE DISTRIBUTION POSES NO DANGER TO MILITARY LOYALTY, MORALE OR DISCIPLINE

Regardless of whether the open house was a public forum, the Air Force ban on appellants' literature dis-

tribution is inconsistent with the "clear danger" standard which the Supreme Court has applied to literature restrictions on military bases. In *Greer v. Spock, supra,* 424 U. S. at 838-840, the Supreme Court upheld an Army regulation which required prior approval by a base commander before literature could be distributed on-base. In so holding, the Court "emphasized that [the regulation] does not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature." *Id.* at 840. Indeed, the *Greer* Court underscored that under the express terms of the regulation, literature could be ultimately prohibited only when found to pose a *"clear danger to military loyalty, discipline or morale." Id.* (Emphasis added.)

The Court thus distinguished literature distribution from partisan political speeches or rallies, holding that the latter could be uniformly banned from a military base. Although the majority ignores this distinction, the Supreme Court reaffirmed it in *Brown v. Glines,* 444 U. S. 348, 353 n. 8 (1979):[9]

> We specifically emphasized that the Army regulation at issue in *Greer v. Spock* did "not authorize the [base] authorities to prohibit the distribution of conventional political campaign literature." Thus, our decision to sustain that regulation was distinct from our concomitant decision to uphold another regulation that prevented civilians from using a military base as a forum for the expression of political views. [Citations omitted.]

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[9] In *Brown v. Glines,* 444 U. S. 348, 355 (1979), the Court upheld an Air Force prior approval requirement, again emphasizing that, under the regulation, literature could be *prohibited* only if found to pose a "clear danger" to morale, loyalty or discipline.

Read together, *Greer* and *Brown* clearly establish that military restrictions on literature distribution are subject to a different constitutional standard than restrictions on speeches, rallies and the like. The precise standard for reviewing literature restrictions, however, is less clear. In both *Greer* and *Brown*, the Supreme Court repeatedly emphasized that the regulations upheld in those cases would allow the military to prohibit literature only when it posed a "clear danger" to morale, discipline or loyalty. *See Greer v. Spock, supra,* 424 U. S. at 838-840; *Brown v. Glines, supra,* 444 U. S. at 553. Such strong emphasis may be read as constitutionalizing the "clear danger" standard.

To the extent the "clear danger" standard is a constitutional one, the Air Force plainly has not complied with it. Here, the appellants met with the Air Force prior to the open house and, in requesting permission for a literature booth, described the nature of the literature they intended to distribute. The appellants also expressed their willingness to abide by reasonable time, place and manner restrictions.[10] The Air Force never sought to examine the literature and has never contended that it would pose a danger of any kind to loyalty, discipline or morale. Nor did the district court, after reviewing the actual literature, find any such danger. The Air Force simply banned the appellants' literature distribution while permitting other nonmilitary groups to participate and

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[10]Appellants have not disputed the Air Force's right to impose reasonable time, place and manner restrictions on the speech of nonmilitary groups at the open house. Nor do we.

distribute literature.[11] The selective exclusion of appellants' literature cannot be justified as being necessary to protect military loyalty, discipline or morale.

We recognize, however, that the "clear danger" standard in *Greer* and *Brown* was an express element of the regulations at issue in those cases and that, in upholding the regulations, the Court did not state that the standard applied broadly as a constitutional limit on military literature restrictions. The scope and applicability of the "clear danger" standard is thus an open question. We need not and do not reach this question because, in our view, the Air Force's actions are unconstitutional on the two grounds previously discussed.

SUMMARY

We believe that if the Air Force is going to conduct the open house at OAFB in the manner which it has, it must permit the appellants to participate on the same basis as other nonmilitary groups. We emphasize that we do not contend there is any general right to enter OAFB for the purpose of distributing literature. Nor do we reach the question of whether the appellants could be constitutionally excluded if all nonmilitary groups were excluded from the open house.

The Air Force, however, chose to hold an open house that would attract hundreds of thousands of civilians and

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[11]The appellants have never contended that they have a right to distribute their literature at OAFB when it is regularly closed to the public. We need not speculate as to whether a constitutional "clear danger" standard for literature restrictions might apply to such closed military installations.

chose to permit defense contractors and other nonmilitary groups to participate and distribute leaflets on the base to the general public. By thereafter excluding the appellants from the open house, the Air Force violates its own regulation. Moreover, it violates the First Amendment by applying that regulation in a manner which is not content neutral, and by denying appellants access to a public forum without a compelling justification. Finally, the selective exclusion of appellants' literature cannot be justified as being necessary to protect military discipline, loyalty or morale.[12]

The majority, nonetheless, approves of these actions simply because the open house is traditional, serves legitimate purposes and promotes a "civilian ideology." Such a rationale has unsettling implications for the First Amendment. We cannot agree that the First Amendment affords so little protection to free expression by citizens on the property of their government.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[12]Because of the Air Force's differential treatment of appellants compared to other nonmilitary groups, each of these First Amendment and regulatory violations also constitutes a denial of equal protection. *See Jones v. North Carolina Prisoners' Labor Union*, 433 U. S. 119, 133-136 (1977).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 81-0-329

PEOPLE FOR FREE SPEECH AT SAC,
ANNE ELSE,

Plaintiffs,

vs.

UNITED STATES AIR FORCE, COL. JOHN R. McKONE, in his official capacity as base commander,

Defendants.

MEMORANDUM OPINION
(Filed September 1, 1981)

I. GENERAL BACKGROUND

This case involves a constitutional attack on United States Air Force Regulation (AFR) 190-5, which governs participation by the general public at open house events held on Air Force bases.[1] The Air Force is barred under

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[1]AFR 190-5 is entitled "Air Force Participation in Public Events." Subsection 3(d) of the regulation is the provision at issue in this lawsuit. In pertinent part, it provides:

> Participation and cooperation MUST NOT directly or indirectly endorse or selectively benefit or favor or appear to endorse or selectively benefit or favor any private individual, group, corporation (whether for profit or nonprofit), sect, quasi-religious or ideological movement, fraternal organization, political organization, or commercial venture, or be associated with the solicitation of votes in a political election.
>
> (Exhibit No. 26.)

the open house regulation from endorsing or even appearing to endorse any private individual, group, political organization, sect, quasi-ideological movement, or the like.

The plaintiffs[2] espouse certain views on nuclear proliferation, bilateral disarmament, and other related issues. They asked the defendants[3] to allow them to participate in the June 14, 1981, open house activities at Offutt Air Force Base (OAFB) in Bellevue, Nebraska.[4] On account of AFR 190-5, their request was denied. The plaintiffs have since expressed a desire to participate in next year's open house at OAFB if, as expected, one is held.

The plaintiffs maintain that AFR 190-5 violates the First and Fifth Amendments. In terms of relief, they

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[2]Plaintiff "People for Free Speech at SAC" is a voluntary organization of concerned citizens. Plaintiff Ann Else is a member of that organization.

[3]Colonel John R. McKone is the Base Commander of Offutt Air Force Base in Bellevue, Nebraska. He is named as a defendant because he has primary responsibility for conducting open house events at the base.

[4]For at least the past six years, OAFB has held an open house where, for one day, certain designated areas of the base are open to the public. Often as many as 250,000 people attend these open house events. Static displays of military equipment, planes, and weapons systems are set up in the open areas. Aerial demonstrations are also a part of the open house program.

Since OAFB is a "closed" base (*i. e.*, with guards at all entrances and with fence around the entire perimeter), only at open houses or similar public occasions can members of the public gain access to the base without permission of the base commander. Non-Air Force military organizations are invited to participate in the annual open house activities. These include the United States Army, Navy, Marine Corps, Coast Guard, and their respective reserve and recruiting outfits. Some non-military organizations are also allowed to participate. These include defense contractors, local public service organizations, and public safety concerns.

want the Court to declare the regulation unconstitutional, 28 U. S. C. § 2201, and to issue a mandatory injunction insuring their right to participate in any future open houses held at OAFB, 28 U. S. C. § 1361.

The Court has subject matter jurisdiction due to the presence of a federal question. 28 U. S. C. § 1331. Trial was had to the Court sitting without a jury on August 3, 1981. This memorandum opinion constitutes the Court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

II. PROCEDURAL POSTURE OF THE CASE

As mentioned earlier, the plaintiffs asked permission to participate in the June 14, 1981, open house at OAFB. Their request was mailed to the defendants on May 21, 1981 (Exhibit No. 22). Colonel John R. McKone, the base commander at OAFB, turned down the plaintiffs' request by letter dated May 29 (Exhibit No. 23). The plaintiffs filed suit in this Court on June 11 requesting declaratory and injunctive relief (Filing Nos. 1 and 2). A hearing was held on June 12 relative to the request for a preliminary injunction. Relying mainly on *Greer v. Spock*, 424 U. S. 828 (1976), this Court denied relief (Filing Nos. 6 and 7).

On the morning of June 13, an expedited appeal was heard before Chief Judge Donald P. Lay of the United States Court of Appeals for the Eighth Circuit. Following a telephonically convened three-judge panel, the Court of Appeals refused to grant injunctive relief, reasoning that it would be improvident to do so in light of the time element (the OAFB open house was to be held the very

next day), and also because of the limited record. Judge Lay stated, writing for the Court of Appeals:

> We remand to the district court with directions that plaintiff's (sic) complaint should be amended to reflect the challenge against the particular Air Force Regulations involved. This we deem necessary to avoid the issue of mootness as it might relate to the occurrence of a past event, to wit, The Open House, scheduled tomorrow at the Air Base. . . . The parties thereafter should be given a reasonable time to supplement the record with additional evidence, including
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> (a) evidence as to what specific organizations had or may have booths at the Open House and what specific signs or literature were or may be displayed or distributed;
>
> (b) evidence as to what specific literature or other speech forms the plaintiffs attempted to distribute or display at the Air Force Open House of June 14, 1981.
>
> The district court . . . should thereafter enter its final judgment. The Court is requested to specifically address the issues as to:
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> (a) whether defendants have waived their rights to ban all forms of free speech during public demonstrations such as the open house; and (b) whether defendants have discriminated against plaintiffs in view of the recognition given to other organizations to have booths and distribute literature; and (c) whether plaintiffs (sic) distribution of literature vis-a-vis public speeches and demonstrations may be banned without a finding by the Command of the Air Force that it would disrupt the discipline and morale of its troops. In addition to the above, the Court should, of course, address any other issues raised by the parties.
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> (Filing No. 10).

Immediately after Judge Lay's order was issued, the plaintiffs petitioned the United States Supreme Court for a preliminary injunction. Their petition was denied on the evening of June 13 by Justice Blackmun.

Pursuant to the Eighth Circuit's remand order, the plaintiffs filed their amended complaint on June 26 (Filing No. 12). The defendants filed their amended answer on July 13 (Filing No. 13). On August 3, 1981, a bench trial was conducted. Evidence along the lines set out in the Circuit Court's directive was presented by the parties.

III. FINDINGS OF FACT

A. First Amendment Activity by Those Allowed to Participate at the 1981 OAFB Open House

There were essentially four types of groups that OAFB officials let participate in the 1981 open house. Those groups were allowed to maintain booths and/or distribute literature and other items.[5] The first group included or-

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[5]All of the literature which was available for dissemmination at the June 14, 1981, open house at OAFB was reviewed by Major Gary Trout. He was the project officer for the entire open house event. Aside from the protest-oriented material that the plaintiffs wanted to distribute, Major Trout identified only one item which he questioned whether should be available for distribution. That item was a booklet entitled "Protection in the Nuclear Age," published in 1977 by the Defense Civil Preparedness Agency of the United States Department of Defense (Exhibit No. 30). The booklet, evidently written for the civilian reader, explains the dangers that would be faced in the event of a nuclear attack and how those dangers should be dealt with by the general public. Because he was uncertain whether the booklet was appropriate for distribution under AFR 190-5, Ma-

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ganizations that provided support services to those in attendance at the open house. For the most part, they operated refreshment concession stands and first aid stations. The second group was comprised of organizations that play an integral role in the function of the military, such as the various military service outfits attached to OAFB, recruiters, and defense contractors. Among the third group were several organizations indicative of community involvement by OAFB personnel in the City of Bellevue, Nebraska, such as the Chamber of Commerce and Big Brothers/Big Sisters. The fourth and final category of participants was comprised of safety-oriented concerns. For example, the Coast Guard handed out material on safe boating, and the Nebraska Highway Patrol distributed safe driving manuals.

The Court has carefully reviewed all of the literature and material which was available for distribution at the 1981 OAFB open house (Exhibit Nos. 1A-20C). The pamphlets and promotional items distributed by the various military service branches were for the most part designed to serve recruiting needs. (Exhibit Nos. 1A-10). The lit-

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jor Trout referred the matter to Colonel Henry Green, the Staff Judge Advocate in OAFB's legal office. Colonel Green decided that the booklet should not be made available at the open house. He testified that his decision to withhold the government publication was *not* based on AFR 190-5, *i. e.*, he did not feel that it could really be typified as "political" or "ideological." Instead, he stated that he had two different reasons for his decision. First, he felt that it was not in keeping with the "general purpose" of he open house, to wit, to let the public see what sort of work was being done at OAFB. Second, he felt that the very title of the booklet might be viewed by some as "controversial," and he wanted to avoid any such controversy at the open house.

erature made available by the three defense contractors present—McDonnell Douglas, Boeing, and General Electric—was quite narrowly confined to presenting facts and figures about aircraft and weapons systems that they were currently supplying to the Air Force (Exhibit Nos. 11A-13). The testimony at [illegible] showed that the defense contractors were not permitted to hand out material of any other kind. That is, they were not allowed to distribute literature promoting their consumer products or public relations material regarding their corporations. The Bellevue, Nebraska, community groups that were allowed to participate disseminated information promoting their various activities. For example, the Chamber of Commerce distributed tourist-oriented pamphlets on OAFB's Strategic Air Command Museum, Historic Bellevue, and Fontenelle Forest (Exhibit Nos. 19A-19C). The local chapter of Big Brothers/Big Sisters distributed material designed to inform the general public of their programs as well as to recruit volunteers (Exhibit Nos. 17A-17E). A group by the name of Volunteers in Diversion and Advocacy (VIDA) distributed material on the youth-oriented program, Operation Bridge (Exhibit No. 16). A local model airplane club was also allowed to hand out information in the form of a newsletter (Exhibit No. 15B). Finally, as already mentioned, safety-oriented groups like the Coast Guard, the Nebraska Highway Patrol, the United States Department of the Interior, and the Civil Air Patrol, handed out material in the vein of safety "do's and don't's."

B. First Amendment Activity by the Plaintiffs That Was Not Allowed at the 1981 OFAB Open House

The plaintiffs asked the defendants' permission to engage in the following kinds of activity at the 1981 OAFB

open house: (1) slide shows; (2) clowns; (3) theatre; (4) leafletting; (5) music/songs; and (6) peace literature (Exhibit No. 22). Offering to comply with any of the defendants' time, place, and manner requirements, plaintiffs wanted to set up a booth to stage these activities. The evidence at trial dealt mainly with the peace literature and leaflets that the plaintiffs wished to disseminate. Those items included a reprint of a lecture by former World Bank President Robert S. McNamara (Exhibit No. 32), a flyer advertising a CBS television documentary on nuclear warfare (Exhibit No. 33), another flyer on which was printed the slogan "it will be a great day when our schools get all the money they need and the air force has to hold a bake sale to buy a bomber" (Exhibit No. 34), and a reproduction of an essay on the nuclear arms race and Christian morality (Exhibit No. 35).

The plaintiffs also were not allowed to engage in other speech forms. One of the members of the plaintiff organization was denied permission to OAFB because he was wearing a T-shirt bearing the slogan "No Nukes in the Breadbasket" (Exhibit No. 36).[4] Other members of the

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[4]One of the members of the plaintiff organization was permitted to enter the base while wearing a red T-shirt with the message "Jobs, Not Bombs" emblazoned on it in black lettering. Lt. Col. Russell J. Suchy, OAFB's Chief of Security Police at the time of the 1981 open house, made the decision to admit the individual wearing that T-shirt. The gate sentries had summoned Lt. Col. Suchy to determine whether certain individuals belonging to the plaintiff organization should be allowed on base even though they were wearing and/or carrying protest-oriented messages. Lt. Col. Suchy testified at trial that the "Jobs, Not Bombs" T-shirt was not "sufficiently political" to justify denying its owner admission to the base.

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group were told that before entering the base they would have to remove buttons with messages such as "Nuclear Arms Freeze" (Exhibit No. 37), and "No Nukes" (Exhibit No. 38). Testimony at trial also indicated that certain members of the group were told that they would not be allowed to enter the base unless they removed protest messages that they had taped to their clothing. Finally, the evidence showed that several members of the plaintiff organization were removed from the base chapel just after they had participated in the celebration of a Roman Catholic Mass. The defendants' officers testified that the plaintiffs were ordered to leave the chapel facility simply because it was not part of the area open to the public that day, and not because of any First Amendment activity in which they may have been engaged. Those persons removed from the chapel were temporarily detained at the base security, office, issued "ban and bar" letters, and then escorted off the base.

IV. CONCLUSIONS OF LAW

A. OAFB as a Public Forum

The Circuit Court poses the question of whether the defendants have waived their right to ban all forms of

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This incident demonstrates clearly one of the practical problems inherent to AFR 190-5. That is, Lt. Col. Suchy had instructed his security personnel that civilians should not be allowed to enter the base if they had signs, buttons, or clothing that was "political" or "ideological" in nature. He did not give them guidance about how to determine whether a given message fell into one of those two categories. Instead, he operated on the premise that each sentry would have to make certain "judgment calls;" as was the case with the "Jobs, Not Bombs" T-shirt, the sentry could call Lt. Col. Suchy to the base gate if he felt unqualified to make a determination in a close case.

free speech during public demonstrations such as the annual open house. This of course is the pivotal issue in the case at bar.[7] The plaintiffs maintain that an OAFB open house creates a "temporary public forum," and that the Air Force thus waives its right to ban all forms of free speech when such events are held. The defendants, relying chiefly on *Greer v. Spock*, 424 U. S. 828 (1976), reject the notion of a temporary public forum.

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[7]The public forum issue is pivotal because it controls the flow of the three-step analysis applicable to this case. As pointed out in *Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital District*, 478 F. Supp. 1250, 1255 (N. D. Tex. 1979), this analysis begins with a determination of whether the activity in question is the type of speech protected by the First Amendment. If the activity is protected speech, the court must next decide whether the proposed forum is a public forum, *i. e.*, whether it is an appropriate forum for the speech. If the court concludes that the proposed forum is not a public forum, the analysis stops there, and the only remaining questions are whether the regulation has a rational basis, *see Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 134-36 (1977), and whether it is applied in a nondiscriminatory fashion, *see Greer v. Spock, supra*, 424 U. S. at 838-39. If, however, the court concludes that there is a public forum, it must then balance First Amendment rights against the government's interest in regulating that speech. The *Dallas County Hospital District* case suggests that this three-step analysis was applied by the Supreme Court in *Greer v. Spock, supra, Lehman v. City of Shaker Heights*, 418 U. S. 298 (1974), *Grayned v. City of Rockford*, 408 U. S. 104 (1972), and *Tinker v. Des Moines Independent Community School District*, 393 U. S. 503 (1969). It also appears that this analysis was most recently utilized in *United States Postal Service v. Council of Greenburgh Civic Associations*, 101 S. Ct. 2676, 2686 (1981).

The defendants concede that the activity involved in this case is protected speech. Thus, the first step of the analysis is complete. The defendants, however, hotly contest the plaintiffs' assertion that an OAFB open house constitutes a public forum. Maintaining steadfastly that no public forum exists at such events, the defendants suggest that the Court not proceed to the balancing process called for by the third phase of the operative analysis.

Any discussion of civilian free speech rights on military installations must focus on the Supreme Court's decision in *Greer v. Spock, supra.*[3] The *Spock* case involved a First Amendment challenge to two army base regulations. One regulation prohibited speeches and demonstrations of a partisan political nature. The other provided that no written material (*e. g.*, newspapers, magazines, handbills, etc.) could be distributed unless prior approval was obtained from the base commander. Under the latter provision, the base commander could stop distribution only where he perceived a "clear danger to the loyalty, discipline, or morale of troops" at the base. The regulations were challenged by political candidates who wanted to enter the base so that they could distribute campaign literature and meet with service personnel regarding election issues. The Supreme Court upheld the base, regulations, thereby rejecting the plaintiffs' contention that they ran afoul of the First Amendment.

In regard to the crucial issue of whether the army base was a public forum where political candidates should be allowed to engage in First Amendment activity, the Supreme Court stated:

> [t]he notion that federal military installations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens, is . . . historically and constitutionally false.
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> *Greer v. Spock, supra,* 424 U. S. at 838.

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[3]*See also Brown* v. *Glines,* 444 U. S. 348 (1980) (discussing permissible limitations on First Amendment activity by service personnel while on base).

The *Spock* opinion does not directly address the precise question posed in the case at bar, to wit, whether a one-day open house on a "closed" military installation creates a temporary public forum. *Spock* nonetheless is helpful in setting out the general guidelines applicable to this case. That is, in commenting on the earlier case of *Flower v. United States*, 407 U.S. 197 (1972) (*per curiam*), the *Spock* Court clearly rejected any notion of a constitutional principle "that whenever members of the public are permitted freely to visit a place owned or operated by the government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer v. Spock, supra*, 424 U.S. at 836. Perhaps more pertinent to evenhanded but still selective admission of civilians to a military base, Justice Stewart wrote:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at a base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatsoever.
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> *Id.* at 838 n. 10.

While not directly on point, it appears to this Court that the above-cited footnote from *Spock* implicitly answers the temporary forum argument raised in this case. That is, this Court perceives little difference between permissible

subject matter regulation of speech[9] on a military base over an extended period of time, as was sanctioned in *Spock*, and permissible subject matter regulation of speech on a given day, as with the OAFB open house in the case at bar.[10] While of course there is an obvious distinction in a literal sense, the basic premise behind the speech regulation in each case is identical, to wit, keeping official military activities on the base completely free of entanglement with partisan political or ideological controversies of any kind.

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[9]For an explanation of subject matter regulation of speech, as opposed to content-based regulation, see footnote 13, *infra*.

[10]Two other observations are appropriate. First, just because OAFB officials decide to hold an annual open house under tightly regulated conditions does not mean that they have abandoned their obvious special interest in base security which undoubtedly exists on the remaining 364 days of the year. In other words, the staging of an open house is radically dissimilar to the factual situation confronted by the Supreme Court in *Flower v. United States*, 407 U. S. 197 (1972), where the military attempted to regulate speech on a public thoroughfare running through the base.

Second, the plaintiffs place a great deal of emphasis upon the fact that the Air Force, by staging open house events, attempts to foster a positive image of its functions under the guise of informing the general public of what sort of work is done at the base. The Air Force does not dispute this. It is fairly obvious that an open house of any kind lends itself to mild forms of propaganda. The plaintiffs, perceiving OAFB open houses as blatant propaganda, claim that they should have the opportunity to counter the "views" presented there by the traditionally military establishment. This assertion is not warranted under the existing jurisprudence. That is, the plaintiffs erroneously assume that simply because an instrumentality is used for the communication of ideas or information, it thereby becomes a public forum. *Cf. United States Postal Service v. Council of Greenburgh Civic Associations*, 101 S. Ct. 2676, 2685 n. 7 (1981) (upholding postal regulation which prohibited deposit of unstamped material in residential mailboxes).

In sum, the temporary public forum argument asserted by the plaintiffs is untenable in view of *Spock*. Furthermore, the Court's research indicates that there is no post-*Spock* case law to support the notion of a temporary public forum on a closed military installation.[11] Creation of such a legal principle is not warranted under the facts of this case.

B. Enforcement of AFR 190-5

The Circuit Court has also asked this Court to address the issue of whether AFR 190-5 is enforced in a discriminatory, and thus unconstitutional, fashion at OAFB open house events. *See Greer v. Spock, supra*, 424 U. S. at 838-39. In other words, given the fact that other organizations were allowed to have booths and disseminate literature at the June 14, 1981, event at OAFB, were the plaintiffs discriminated against because of their particular views on nuclear proliferation and bilateral disarmament?[12]

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[11]Apparently recognizing that no precedent directly supports their argument, the plaintiffs have attempted to rely on loosely-drawn analogies between the instant case and the various First Amendment cases involving non-military base forums. In view of what the Supreme Court has said about the unique First Amendment characteristics of military bases, *see Brown v. Glines*, 444 U. S. 348, 353-57 (1980), and *Greer v. Spock, supra*, 424 U. S. at 835-39, the cases relied upon by the plaintiffs are inapposite.

[12]Before beginning this discussion, it should be noted that the defendants' decisions regarding what groups to allow to participate need not be subjected to any sort of strict scrutiny. Once there is a finding that no public forum exists, as determined by this Court, it is only appropriate to inquire whether the defendants had a rational basis for excluding certain groups seeking to engage in First Amendment activity. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 134-36 (1977).

The facts reviewed in part III of this memorandum opinion indicate that AFR 190-5 has been objectively and evenhandedly administered. In this regard, the plaintiffs were simply unable to show that any other political or ideological organization with views presumably more favorable to OAFB's military mission was allowed to participate in the open house event.[13]

In regard to the application of AFR 190-5, the plaintiffs instead argue that the various military outfits and defense contractors at the open house were there to convey a definite political or ideological viewpoint, to wit, that a high technology, nuclear-oriented military system is a viable way for the United States to conduct itself in world affairs. Thus, the plaintiffs contend, AFR 190-5 is discriminatorily applied because their markedly alternative views were excluded from the open house program. From a literal standpoint only, the plaintiffs may have a point. That is, if the terms "political" and "ideological" in AFR 190-5 are construed broadly enough, almost anything—including the blandly informative displays put on

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[13]Seemingly recognizing that no other easily identifiable political or ideological group even asked to participate in the 1981 open house, the plaintiffs also challenge AFR 190-5 as an unconstitutional "subject matter" regulation (to be compared with "content-based" regulation). This Court is aware that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Commission*, 447 U. S. 530, 537 (1980). But "governmental regulation based on subject matter has been approved [by the Supreme Court] in narrow circumstances," and such regulation on military bases is one of those circumstances. *Id.* at 538. Therefore, the plaintiffs' argument that AFR 190-5 constitutes impermissible subject matter regulation is without merit.

by the military service branches and their contractors—falls within the ambit of those two terms. However, such a broad construction of the terms "political" and "ideological" is not warranted. This is obvious from the *Spock* case which involved an army base regulation prohibiting "political speeches and similar activities." In *Spock*, the Supreme Court certainly did not deal with the ban on "political" activity in an all-inclusive esoteric fashion. Instead, the Court dealt with that term in a practical, common-sense manner. This Court is proceeding in like manner.

The terms "political" and "ideological" lend themselves neither to precise definition nor unerring application. This is demonstrated by the incident at the June 14, 1981, open house with the "Jobs, Not Bombs" T-shirt. The OAFB chief security officer determined that this particular message T-shirt was not "sufficiently political" to justify exclusion of the individual wearing the shirt from the base. The defendants in this case admit that administration of AFR 190-5 sometimes requires discretionary judgment calls. This alone does not render the regulation unconstitutional. The relevant inquiry involves whether the language of the regulation has been evenhandedly and objectively applied, taking into consideration the semantical problems inherent to *any* written law or regulation. This Court finds that the defendants have complied with that requirement. Thus, AFR 190-5 cannot be assailed on the grounds that it is unconstitutional as applied.

C. Distribution of Literature under AFR 190-5

The third and final legal question raised by the Circuit Court's remand order is whether the plaintiffs' dis-

tribution of literature, vis-a-vis public speeches and demonstrations, may be banned at OAFB open house events absent a finding by the Air Force command that it would disrupt the discipline and morale of the troops stationed there. This question presumably is posed because of certain language in the *Spock* case. *Spock* involved two separate army base regulations. The first regulation (Fort Dix Reg. 210-26 (1968)) forbade any political speeches or demonstrations on the base. The rationale for this regulation was to keep official military activities at Fort Dix wholly free of entanglement with partisan politics of any kind. The other regulation (Fort Dix Reg. 210-27 (1970)), which is the one pertinent to the discussion here, related to on-base distribution of literature. It covered everything from handbills to magazines. This regulation allowed the base commander to ban any publication which he found to constitute a clear danger to military loyalty, discipline, or morale. However, the distribution of a publication could not be prevented merely because the base commander did not like its contents or because it was critical of government policies or officials. The policy reason for this second regulation was different from the entanglement rationale behind the political speech regulation. The regulation on distribution of literature was predicated on a military commander's inherent right to take actions to avert what he perceives to be a clear danger to troop loyalty, discipline, or morale.

The record in this case shows that there was no finding by the Air Force command that the literature sought to be distributed by the plaintiffs presented any threat to the loyalty, discipline, or morale of the troops stationed at OAFB. The defendants contend that no such finding

was necessary. They reason that AFR 190-5 is predicated not on a military commander's broad discretion to control his troops, but rather on avoiding military entanglement with controversies better resolved in a civilian forum. Thus, the defendants argue that the use of the entanglement rationale to uphold the political speech regulation, which was accepted by the Supreme Court in *Spock*, should likewise be accepted by this Court to uphold AFR 190-5, which governs political and ideological speech in both verbal and written form.

The Court agrees with the defendants' analysis. Two major reasons buttress this conclusion. First, it does not seem from *Spock* that a "clear danger" proviso is constitutionally mandated in military regulations dealing with on-base dissemination of the printed word.[14] The *Spock* Court only discussed that requirement because it was expressly stated in the Fort Dix regulation.[15] Second, it appears to this Court that the entanglement rationale behind AFR 190-5 is just as valid and meaningful with regard to political and ideological speech in written form as it is with regard to that type of speech in verbal form.

In sum, the Court concludes that the entanglement rationale adequately justifies AFR 190-5's limitations on

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[14]See *Greer v. Spock*, *supra*, 424 U. S. at 841 (Burger, C. J., concurring).

[15]Of course, an argument can be made that the Supreme Court would have viewed Fort Dix Reg. 210-27 (1970) differently had it not included a "clear danger" requirement. That is, the Court stated that *"it is to be emphasized* that [the regulation] does not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature. *Greer v. Spock*, *supra*, 424 U. S. at 840 (emphasis added).

distribution of political and ideological literature. Therefore, the Air Force command need not make a specific finding under that regulation that distribution of literature would present a clear danger to troop discipline, loyalty, or morale.

V. SUMMARY AND CONCLUSION

The staging of an annual open house at a "closed" military installation like OAFB does not create a temporary public forum for purposes of the First Amendment. The evidence in this case demonstrated that the plaintiffs were excluded from the 1981 OAFB open house pursuant to a permissible scheme of subject matter speech regulation. They were not discriminated against because of the specific content of their proposed First Amendment activity. AFR 190-5, being justified by the Air Force's desire to avoid entanglement in civilian controversies, cannot be assailed on the basis that it allows the banning of literature without a finding as to clear danger to troop discipline, loyalty, or morale. The regulation is neither unconstitutional on its face nor unconstitutional as applied.

Accordingly, a separate order will be entered this date denying plaintiffs' request for declaratory and injunctive relief.

BY THE COURT:

/s/ Albert G. Schatz
Judge, United States District Court

APPENDIX C

d. Participation and cooperation MUST NOT directly or indirectly endorse or selectively benefit or favor or appear to endorse or selectively benefit or favor any private individual, group, corporation (whether for profit or nonprofit), sect, quasi-religious or ideological movement, fraternal organization, political organization, or commercial venture, or be associated with the solicitation of votes in a political election.

(1) Included among the organizations which may not be selectively benefited or favored are: Religious and sectarian groups; fraternal organizations, such as the Knights of Columbus, Loyal Order of the Moose, or B'nai B'rith; and quasi-religious or ideological movements or organizations, such as Moral Rearmament, "Sing Out," and "Up with People."

(2) Providing use of government facilities, such as transportation, housing, or messing, at government expense is a prohibited type of selective benefit or favor.

(3) The restriction on endorsing or selectively benefiting private organizations should not be interpreted as barring any group that offers to provide entertainment on base to military personnel, civilian employees, or dependents. However, promotion of the groups' objectives through handouts, speeches, program content, or other forms of promotion in connection with the entertainment, including the period before and after the entertainment, is strictly prohibited.

e. Participation MUST NOT support advertising, publicity, promotional activities or events which benefit or favor a commercial venture.

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CLERK

No. 82-335

In the Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE FOR FREE SPEECH AT SAC AND ANNE ELSE, PETITIONERS

v.

UNITED STATES AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an "open house" on a military base in which certain civilian organizations participate must also be open to organized advocacy groups expressing views on political issues related to the military.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 675 F.2d 1010. The opinion of the district court (Pet. App. 43-61) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1982. On July 20, 1982, Justice Blackmun extended the time for filing a petition for a writ of certiorari to August 27, 1982, and the petition was filed on August 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Offutt Air Force Base (OAFB) near Bellevue, Nebraska, is ordinarily closed to the public; civilians are admitted only with the permission of the base commander.

Once a year, however, OAFB conducts an "open house" during which members of the public are invited on the base. The open house features "aerial demonstrations, static displays of aircraft and military equipment, military bands and drill teams, and information and recruiting booths manned by the Air Force, Navy, Marine Corps and Coast Guard" (Pet. App. 2).

Certain nonmilitary organizations also had booths at the 1981 open house, out of which this litigation arose. Specifically, there were private refreshment concessions and first aid stations; "safety-oriented concerns * * * [such as] the Coast Guard[, which] handed out material on safe boating, and the Nebraska Highway Patrol[, which] distributed safe driving manuals" (Pet. App. 48); Bellevue community service organizations in which base personnel were active, such as "[t]he local chapter of Big Brothers/Big Sisters[, which] distributed material designed to inform the general public of their programs [and] to recruit volunteers" (*id.* at 49); and the Chamber of Commerce, which "distributed tourist-oriented pamphlets on OAFB's Strategic Air Command Museum, Historic Bellevue, and Fontenelle Forest" (*ibid.*). Three defense contractors whose products were used at OAFB were also present, but the district court found that "[t]he literature made available by the[m] * * * was quite narrowly confined to presenting facts and figures about aircraft and weapons systems that they were currently supplying to the Air Force * * *. [T]he defense contractors were not permitted to hand out material of any other kind. That is, they were not allowed to distribute literature promoting their consumer products or public relations material regarding their corporations" (*id.* at 48-49).

Shortly before the 1981 open house, petitioners wrote to the OAFB base commander and asked permission to participate. They explained that they wished " 'to speak to the propriety of nuclear proliferation, bilateral disarmament,

the conversion of the weapons of war to instruments of peace, and the very existence of OAFB in our community' " (Pet. App. 3). Petitioners proposed to address these subjects at the open house by means of "a slide show, clowns, theatre, leafleting, musical songs and peace literature" (*ibid.*). When the base commander denied petitioners permission to participate, petitioners brought suit in the United States District Court for the District of Nebraska. That court refused to order OAFB to permit petitioners to participate in the 1971 open house, and the court of appeals, noting the short time available for decision, affirmed. Justice Blackmun also denied relief (*ibid.*).

2. After the 1981 open house was completed, petitioners amended their complaint to seek a declaratory judgment and an injunction against the OAFB practice. After a trial, the district court ruled against petitioners. The court relied on *Greer* v. *Spock*, 424 U.S. 828 (1976), noting that in *Greer* this Court held that political campaigns could be barred from a military installation even if " 'a civilian lecture on drug abuse, a religious service by a visiting preacher at a base chapel, or a rock musical concert' " were permitted (Pet. App. 54, quoting 424 U.S. at 838 n.10). The court reasoned that "the basic premise behind [both] the speech regulation" upheld in *Greer* and the restriction OAFB imposed on petitioners "is identical, to wit, keeping official military activities on the base completely free of entanglement with partisan political or ideological controversies of any kind" (Pet. App. 55).

The district court also noted that the Air Force regulation governing functions such as the OAFB open house specified that the Air Force "MUST NOT directly or indirectly endorse or selectively benefit or favor or appear to endorse or selectively benefit or favor any * * * quasi-religious or ideological movement * * * [or] political organization

* * * or be associated with the solicitation of votes in a political election" (Department of the Air Force Reg. (AFR) 190-5, para. 3d. (Mar. 18, 1970) (emphasis in original)). The district court found that this regulation "has been objectively and evenhandedly administered. In this regard, [petitioners] were simply unable to show that any other political or ideological organization with views presumably more favorable to OAFB's military mission was allowed to participate in the open house event" (Pet. App. 57).

3. The court of appeals, sua sponte considering the case en banc, affirmed. It rejected petitioners' argument that at the open house the Air Force itself engaged in ideological communication of a sort that obligated it to permit petitioners also to participate (Pet. App. 13-15). The court of appeals explained that "[t]he governmental interest which is served by the open house, beyond any 'ideological message,' is that the government is showing its citizens, who pay for the military, how it is spending their money" (*id.* at 15). The court added (*id.* at 24): "To us there is a vast difference between allowing the military to 'speak' in an effort to foster base/community relations and allowing the military to throw the weight of its resources behind a non-military ideological movement. * * * [W]e agree with the district court that the rationale of *Greer* v. *Spock* regarding non-involvement of the military in partisan politics is also applicable to non-involvement of the military in civilian ideological movements."

The court of appeals also rejected the argument that OAFB was required to permit petitioners to participate in the open house because it allowed some other civilian organizations to appear. The court pointed out that "[m]any of the 'civilian' groups which were given booths were, in fact, base-sanctioned, private organizations composed mostly of base personnel and their dependents"

(Pet. App. 18). In connection with the defense contractors, the court explained (*id.* at 18-19, 25; emphasis in original):

> The defense contractors provided literature and information about aircraft and weapon systems *currently* being supplied to the Air Force. The display and operation of aircraft was quite obviously a major part of the open house program. That the Air Force allowed contractors to provide, in the words of the district court, "blandly informative displays," was also reasonably related to the open house program. * * * It is of considerable importance to us that the contractors were strictly limited to the display of and information on equipment being currently supplied to the Air Force.
>
> * * * * *
>
> To characterize the defense contractors' displays as "ideological" is to ignore the fact that they were only showing the "current state" of the Air Force. The contractors were not at the open house to debate the current or future state of the military but rather to show the current state.

Three judges dissented. They argued principally that OAFB acted impermissibly in "permitting defense contractors to participate in and benefit from the open house — in both commercial and ideological capacities — while denying [petitioners] the same opportunity" (Pet. App. 29). The dissenters also asserted that petitioners should have been allowed to participate in the open house because their "proposed literature booth is clearly compatible with the other activities at OAFB during the open house" (*id.* at 34).

ARGUMENT

Although petitioners attempt to characterize OAFB as a "public forum," they do not claim, and under *Greer* v. *Spock*, *supra*, plainly cannot claim, that they are entitled to

speak on the grounds of OAFB even if no other speakers are permitted there. *Greer* established that a military base, unlike, perhaps, a public street or park, is not a place to which citizens are entitled to access for expressive activities. See 424 U.S. at 838. The dissent in *Greer* did not take issue with the proposition that a military base may be closed entirely to civilians (see *id.* at 858 (Brennan, J., dissenting)); instead, it emphasized the general openness of Fort Dix, the base at issue there (see *id.* at 848-851). See also *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961) ("the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command"). Petitioners' central contention is rather that OAFB acts unlawfully in excluding them from the open house when other civilian organizations are allowed to participate and when the Air Force itself, according to petitioners, engages in speech at the open house. See, e.g., Pet. 7-9, 10, 12, 13.[1]

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[1]Petitioners also refer to certain events at the 1981 open house that give rise to contentions that are not properly before the Court. Specifically, petitioners cite incidents in which members of petitioner People for Free Speech at SAC were excluded from the open house because of messages they wore on their clothing or because they participated in a mass at the base chapel. Pet. 5-6, 7. The court of appeals stated that OAFB could not "constitutionally regulate 'clothing' speech of 'individual members of the general public, including members of [petitioners'] organization" unless the base commander reasonably believed the clothing created a substantial risk of disrupting base activities. Pet. App. 21-22 n.9, citing *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). But the court of appeals noted that petitioners' "amended complaint which was filed following the open house did not raise as an issue the restriction placed on 'clothing' messages, rather [petitioners] sought participation in the open house as a group" (Pet. App. 7 n.3). The court of appeals accordingly concluded that the district court did not have to consider whether to grant petitioners some form of relief for the clothing restrictions (*id.* at 22 n.9). Petitioners do not take issue with the court of appeals' conclusion that they did not properly raise their objection to the clothing restrictions below. Moreover, petitioners do not challenge the court of appeals' statement of the law that should apply to clothing restrictions in the

1. Petitioners' first argument is that because the Air Force "was speaking" and expressed a "pro-nuclear weaponry, pro-Air Force" message to the public at the open house (Pet. 7), petitioners should have been allowed to participate and express a contrary message. Even the dissenting judges in the court of appeals did not endorse this argument (see Pet. App. 34 n.5, 41), and in our view, it is insubstantial. As the court of appeals noted, it is a legitimate function, and a responsibility, of government agencies to explain and justify themselves to the public. See also *Barr* v. *Matteo*, 360 U.S. 564, 574-575 (1959). Government agencies routinely issue statements and engage in activities for this purpose, and petitioners appear to acknowledge that this was the purpose of the open house. See Pet. 6. The Air Force regulation governing events like the open house provides that "Air Force participation in public events * * * is authorized, encouraged, and essential, within the limits defined in this regulation, to * * * [i]nform the public on Air Force preparedness and * * * [d]evelop public understanding of the Air Force mission" (AFR 190-5, paras. 3a.(1) and (3) (Mar. 18, 1970)).

It is implausible to suggest that whenever the government uses a facility that it owns, to explain or justify its policies or activities to the public, it incurs an obligation to make that same facility available to persons who wish to express an opposing view. If this were true, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde

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future and do not seek any form of redress for the restrictions applied at the 1981 open house. We are advised that the OAFB did not attempt to exclude any persons from the 1982 open house because of messages on their clothing.

The court of appeals also ruled that the exclusion of the persons who attended the mass "is invalid based on the record before us" (Pet. App. 22 n.9). We have not sought review of that ruling.

Parks open to every would-be pamphleteer and politician" (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion)). For example, if Air Force officials held a press conference in a government auditorium at which they tried to portray the Air Force in a favorable light, petitioners surely could not claim a constitutional right to speak in the same auditorium to express contrary views. Their rebuttal would have to be offered elsewhere; in this case, for example, petitioners lawfully demonstrated immediately outside OAFB at the time of the open house (see Pet. App. 21 n.9).

2. As both courts below ruled, petitioners' contention that they could not be excluded from the open house because other civilian groups participated is inconsistent with *Greer* v. *Spock*, *supra*. "*Greer* * * * held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 538 (1980). OAFB drew essentially the same distinction here. While petitioners do not propose to speak in support of certain candidates, the advocacy in which they wish to engage is unquestionably political and indeed addresses a subject of great concern to the military. If petitioners were allowed to participate in the open house, then groups advocating political views opposite to petitioners', such as increased defense spending and more reliance on military strength, would presumably also have to be allowed to be present and to attempt to win adherents and evoke displays of support on the base. The resulting dangers of military "entanglement" with political issues and of "the reality [or] the appearance of [the military's] acting as a handmaiden for partisan political causes" (424 U.S. at 839) are apparent. At the same time, the civilian groups allowed to participate in the open house — community service organizations,

safety organizations, and the Chamber of Commerce — are comparable to those civilians who were allowed to speak at Fort Dix. See 424 U.S. at 831 ("talks [on subjects] * * * rang[ing] from business management to drug abuse [,] [v]isiting clergymen * * * participat[ing] in religious services at the base chapel [;] [and t]heatrical exhibitions and musical productions").

We recognize that the participation of the defense contractors is more problematic than the participation of the other civilian groups. But the defense contractors did not engage in any activity remotely resembling overt political advocacy. Both courts below emphasized their understanding that the contractors were narrowly confined to providing facts and figures about the Air Force equipment already on display at OAFB and were not allowed to promote other weapons or products. Petitioners and the dissenting judges urge, in essence, that even this closely circumscribed activity was implicitly commercial, and that the implicitly commercial activity suggested an implicit political message. But many activities — academic lectures on economics or sociology, for example, or even the "business management" lectures approved in *Greer* — might be regarded by some as presupposing or implicitly endorsing a political position. If the military is to apply the distinction endorsed in *Greer*, so that it may forestall political entanglement without depriving servicemen of valuable contacts with civilian groups, it is unreasonable, and potentially more harmful to First Amendment values, to insist that the military also ferret out the implicit political advocacy in civilian activities not ordinarily thought to be political. This is especially true because it is overt political demonstrations — not hidden political messages apparent, for the most part, only to those who actively oppose them — that create the danger of causing

servicemen to take sides and of appearing to align the military with a particular point of view (see *Greer* v. *Spock*, *supra*, 424 U.S. at 846-847 (Powell, J., concurring)).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2]We are also advised that no defense contractors appeared in the 1982 open house at OAFB.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE FOR FREE SPEECH AT SAC and
ANNE ELSE,

Petitioners,

—v.—

UNITED STATES AIR FORCE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

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November 16, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-335

PEOPLE FOR FREE SPEECH AT SAC and
ANNE ELSE, Petitioners

v.

UNITED STATES AIR FORCE, et al.,

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

This case poses a fundamental issue of fairness concerning the military's ability to stage public relations events designed to enhance support for existing military programs and policies. The "open house" at issue herein was designed to be, and presumably is an effective mechanism for the advancement of views supportive of the expenditure of substantial resources in the area of national defense. The presence of representatives

from defense contractors at the "open house" is explicable in no other terms.[1/] Whatever the propriety of such public relations activity in the abstract , the military may not use its facilities to convey to the general public only one side of an issue of critical national importance. Schact v. United States, 398 U.S. 58 (1970); Jenness v. Forbes, 351 F. Supp. 88, 98-101 (D.R.I. 1972). In the absence of a compelling justification related to military security, the military may not bar civilian dissenters

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1/ The extra-record observation of the Solicitor General that no defense contractors appeared at the 1982 "open house" (Br. 10) is factually inaccurate, since the open house included displays from at least General Electric. In any event, the observation is meaningless, since the Solicitor General is careful to refrain from any commitment concerning the participation of defense contractors or other non-military personnel at future events.

from public relations events open to the public which are patently designed to present current national defense policy in a favorable light.[2/]

The Solicitor General's attempt to analogize the open house to a press conference (Br. at 8) is instructive. If the government staged a press conference open to the public, but excluded reporters who disagreed with government policy, the most serious First Amendment issues would be raised. See, e.g., Schact v. United States and Jenness v. Forbes, supra. In many ways,

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2/ Of course, reasonable restrictions may be placed on the time, place and manner of the dissenters' activities. See, e.g., Heffron v. ISKCON, 452 U.S. 640 (1981). Here, plaintiffs had agreed to comply with any such restrictions, and even to submit their written materials (which are in the record below) to the base commander for his prior inspection. See Petition for Certiorari at 7.

the "open house" here is analogous to such a press conference. Just as the government could not exclude certain reporters from a public news conference merely because they might ask embarrassing questions, the military may not exclude members of peace groups from public relations events otherwise open to the general public solely because the peace groups might ask embarrassing questions.[3/]

3/ If anything, the Solicitor General's press conference analogy cuts strongly in favor of petitioners' position. Even if the government staged a "closed" press conference for sympathetic reporters only, dissenters would be equally free to hold an answering press conference. The "open house" at issue herein is, however, a unique event pursuant to which the military exploits its monopoly over military facilities to stage an event designed to advance its views to the general public, which ultimately determines (via elections and other contact with elected representatives) the nation's military policies. Unlike a press conference, peace groups may not stage a comparable event to advance their views.

The government's suggestion that the 1981 open house, at which there were displays of military weaponry and equipment and booths operated by defense contractors, was not a one-sided attempt to convey an ideological message to the public is either naive or disingenuous. The "institutional advertising" represented by the open house for up to 250,000 citizens yearly (675 F.2d at 1012) is of course designed to enhance the image of and support for the military, just as corporate institutional advertising or sponsorship of sports events is designed to garner support for those corporations. See 675 F.2d at 1024 & n.4 (dissenting opinion). And the Court of Appeals' reliance on the fact that the message conveyed only "the 'current state' of the Air Force", not its future state, is hardly relevant, since one-sided factual presentations

unfairly skew public views on matters of vital public concern as much as do one-sided exhortations.[4/]

Under the First Amendment, the military could not stage a Red Square-type military parade down symbolically important Pennsylvania Avenue without at some time permitting anti-military groups to do the same. Having opened up a military base to 129,000 persons for a propaganda show having precisely that purpose, defendants may not, consistent with the content neutrality principle at the core of the First Amendment, deny anti-military groups an opportunity to communicate their contrary message as well.

4/ Hague v. CIO, 307 U.S. 496 (1939) would hardly have been decided differently if Mayor Hague had limited Jersey City's public halls and streets to speech by city officials and contractors doing business with the city concerning the "current state" of city government.

Respectfully submitted,

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